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

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Maj. Janet A. Ashitey
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Re: Colorado State Business Enterprise v. United States Department of the Air Force, Schriever Space Force Base, Case no. R-S/20-09

Dear Mr. Lizza and Maj. Ashitey:

The Rehabilitation Services Administration has received the decision of the arbitration panel in the matter of The Colorado State Business Enterprise Program, petitioner v. The United States Department of the Air Force, Schriever Space Force Base, respondent.

Pursuant to Section 15(c) of the "Policies and Procedures for Convening and Conducting an Arbitration," we are enclosing an electronic copy of that decision.

If you have any questions, please contact Jim McCarthy, Program Specialist, at James.Mccarthy@ed.gov or (202) 245-6703.

Sincerely,

CAROL DOBAK
Digitally signed by CAROL DOBAK
Date: 2023.02.21 08:47:04 -05'00'

Carol L. Dobak
Deputy Commissioner,
delegated the authority to perform the functions and duties of the Commissioner

Enclosure

UNITED STATES DEPARTMENT OF EDUCATION
REHABILITATION SERVICES ADMINISTRATION
RANDOLPH – SHEPPARD ARBITRATION

THE COLORADO BUSINESS ENTERPRISE PROGRAM, Petitioner, and JOHN RILEY, Interested Person, vs. UNITED STATES DEPARTMENT OF THE AIR FORCE, SCHRIEVER SPACE FORCE BASE, Respondent.	R-S/20-09 DECISION & AWARD

Pursuant to the Randolph-Sheppard Act, 20 U.S.C. §§ 107 through 107f (R-S Act), an arbitration was convened in the above-captioned matter, as authorized by 20 U.S.C. § 107d-2. Petitioner Colorado State Business Enterprise Program (Colorado), the designated State Licensing Agency[1] (SLA) pursuant to the R-S Act designated Susan Rockwood Gashel as arbitrator, and the United States Department of the Air Force, Schriever Space Force Base (Schriever) designated J. Mackey Ives as arbitrator. Diego J. Peña was jointly designated by Arbitrators Gashel and Ives to serve as panel chair. John Riley, the licensed blind vendor assigned by Colorado to operate the dining facility at Schriever, was granted leave to appear as an

[1] The State Licensing Agency (SLA) is the agency in each state charged with training, licensing, and supervision of blind persons licensed to operate vending facilities on Federal property. 20 U.S.C. § 107b.

interested party as authorized by 5 U.S.C. § 555(b). The hearing took place on April 19 and 20, 2022 at Schriever. Colorado was represented by Krista Maher and John Lizza. John Riley was represented by Peter Nolan and Andrew J. Schumacher. Schriever was represented by Maj. Janet A. Ashitey, John K. Suehiro, and Melissa M. Garcia.

I. ISSUES

1. Whether Schriever violated the R-S Act and its implementing regulations by failing to award Solicitation FA255020R0010 (Solicitation) for a full food service contract to the SLA based on (1) past performance and the SLA's ability to provide comparable service of a high quality and at a reasonable price and by adding a ten percent HUBZone preference [to Colorado's bid]; and (2) whether Schriever's failure to establish a competitive range for the bids on Solicitation FA255020R0010 violated the R-S Act.

2. In its post-hearing brief, Schriever requested that the panel dismiss the complaint filed by Colorado because it intended to resolicit the Solicitation in accordance with 34 C.F.R. § 395.33(b) and evaluate all proposals in accordance with the Solicitation's Evaluation Methodology, Evaluation Factors and Evaluation Criteria. Schriever states that upon completion of the source selection, it will terminate the current award and award to the new best value awardee and take any other form of action it deems appropriate. Schriever maintains that this intention render's Colorado's complaint academic or moot. Schiever provided case support for its position.[2] Schriever declared this intention after the April 19-20 2022 evidentiary hearing and

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[2] *Peraton Inc. v. United States*, 146 Fed. Cl. 94, 100-01 (2019); *Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 939 (Fed.Cir., 2007); *also Veterans Choice Med. Equip., LLC*, B-409940.3, Nov. 26, 2014 2014 CPD ¶ 357 at 4.

offered no evidence to support or explain its declared intention. Does Schriever's declared intention to reissue the Solicitation render Colorado's complaint moot?

II. STANDARD OF REVIEW

This Panel is directed by the United States Department of Education (DoE) to, in accordance with the provisions of subchapter II of chapter 5 of title 5, give notice, conduct a hearing, and render its decision. 20 U.S.C. § 107d-2(a). That subchapter provides, at 5 U.S.C. § 556(d), that the proponent of an order has the burden of proof and an order may issue "in accordance with the reliable, probative, and substantial evidence." Accordingly, the SLA has the burden of proof to proving that Schriever violated the R-S Act. To satisfy this burden, the SLA must provide substantial evidence, which has been held to be "more than mere scintilla but something less than the weight of the evidence." *Pennaco Energy v. U.S. Dep't of Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004).

III. FINDINGS OF FACT

1. Colorado operated the Schriever dining facility for 15 years (Transcript, Volume I (TR I), 244:4-7), receiving high quality marks and achieving the Hennessey Award for best food operation at Space Command (Petitioner's Exhibit (Ex.) 8, TR I, 80:10-90:17, 244:12-245:20.)

2. Schriever issued its Solicitation for services nearly identical to one listed in previous performance work statements for contracts to perform food services at Schriever (TR 1, 90:18-91:1). The Solicitation provided that "preference" would be given to Colorado so long as it met the competitive criteria, was responsive to the needs of the contract, and offered a reasonable price.[3] The Solicitation further stated: While the Act does not define what a

[3] The 1974 amendments to the R-S Act changed what was a preference to a "priority." *State ex Rel. Dept. of Human Services v. Weinberger*, 582 F. Supp. 293 (W.D. Okla. 1982).

"reasonable" price is, in practice, if the BEP bid falls within the competitive range as determined by the Contracting Officer, then the contract will be awarded to the BEP, even if the price is higher than that of the best value offer." (Ex. 4, p. 111).

3. The Solicitation emphasized that the Past Performance was "significantly more important than price" (Ex. 4, p. 114; Ex. 7, p. 4; TR I, 75:20-76:7; TR II, 10:3-8). Mr. William Ray, the contracting officer for Schriever in 2020 until the award at issue in this case was made, and Captain Brian Cockcroft, Operations Officer for Schriever, explained that past performance was significantly more important because the dining facility is in a restricted area and that Schriever was 13 miles from another food service operation (TR I, 76:8-21; TR II, 64:1-65:10). In that regard, the Solicitation required each bidder to submit three total past performance contracts, one of which must show the bidder as the prime contractor (Ex. 4, Solicitation at p. 112). Additionally, the Solicitation required that the past performance contracts to have been performed within the past five years or a minimum of six months to be considered relevant (Ex. 4, Solicitation at p. 112-113).

4. Colorado timely submitted its proposal on June 29, 2020 (Ex. 5, Colorado's Proposal). Schriever AFB received five proposals (Ex. 7, Source Selection Decision at p. 1). Schriever gave Colorado's overall past performance a rating of "Satisfactory" with a score of 366 out of 500 (Ex. 7, Source Selection Decision at p. 2). This "Satisfactory" rating was given despite Schriever's recognition that Colorado's service under the current contract was provided "in a very good manner" (Ex. 7, Source Selection Decision at p. 3). This was also despite the fact, as Mr. Ray testified, that the CPARs Excellent to Very Good ratings were the most relevant,

recent, and quality evidence of how Colorado was performing the Schriever contract (TR I, 91:2-92:5). Additionally, Schriever recognized that Colorado's price was lower than the Air Force's Independent Government Cost Estimate (Ex. 7, Source Selection Decision at p. 3).

5. Schriever awarded the contract to Native Resource Development Co, Inc. ("Native") (Ex. 7, Source Selection Decision at p. 3). In making its award decision, Schriever added a 10% HUBZone preference to Colorado's proposed price for the purpose of comparing its price to Native's proposed price (Ex. 7, Source Selection Decision at p. 2; TR I, 58:9-16). Schriever also awarded Native 499 out of a possible 500 points for past performance (TR I, 183:17-184:4). Native obtained this high score because Mr. Ray consider the past performance of Native, in spite of the fact that Native's past performance did not meet the Solicitation's recency requirements (Ex. 16, Native's Past Performance Matrix; TR I, 101:6-102:9, 227:22-231:15).

6. Mr. Ray agreed that Colorado could have easily explained any deficiencies in its past performance matrix had he given it the opportunity (TR I, 110:7-111:1). Mr. Ray also admitted that he would have recommended awarding the contract to Colorado, even with the $2 million higher price, if it had been given the Very Good to Exceptional rating for past performance that were evidenced by the CPARs (TR I, 213:6-19). In spite of these acknowledgements, Schriever did not set a competitive range or hold discussions with Colorado (Ex. 7, Source Selection Decision at p. 1).

7. Don James is the President and CEO of Food Services Inc. of Gainesville, the teaming partner with Colorado and Mr. Riley for the past 15 years of operation of the Schreiver cafeteria. TR II, p. 8. Mr. James testified that, in operating other R-S Act contracts, that he had participated in meaningful discussions with contracting officers dozens of times, and that his

team never failed to adequately explain any perceived technical deficiencies. TR II, p. 22. Mr. James testified that in his understanding, Colorado's scores were low because the Air Force wanted more detail than Colorado provided, and that more detail was not provided due to the strict page limits imposed by the Solicitation. TR II, p. 23-24.

8. On August 20 and 31, 2020, Colorado filed its requests for arbitration (Ex. 1, Arbitration Request, Ex. 2, Amended Arbitration Request). On February 19, 2021, the Department of Education ("DOE") convened this arbitration.

9. In its Post-Hearing Brief, Schriever sought dismissal of Colorado's complaint, advising that Schriever decided to re-solicit the decision, stating it:

> will evaluate all proposals in accordance with the Solicitation's Evaluation Methodology, Evaluation Factors, and Evaluation Criteria. Upon completion of the source selection, the Air Force will terminate the contract and award to the new best value awardee.

Schriever offered no evidence at the hearing expressing any intent to reissue the Solicitation. Additionally, after the close of the hearing, Schriever made no attempt to reopen the hearing or request leave to supplement the record any evidence regarding its intent to reissue the Solicitation.

IV. CONCLUSIONS OF LAW

1. Congress passed the R-S Act in 1936 to provide blind and visually impaired persons with increased employment opportunities by allowing them to operate vending machines and cafeterias on federal property. 20 U.S.C. § 107(b). Under the R-S Act, blind vendors register with a State Licensing Agency ("SLA"), which in turn applies for contracts on federal property to operate vending machines or cafeterias. As such, the SLA determines the blind persons assigned to awarded contracts. The Colorado Department of Labor and

Employment, Division of Vocational Rehabilitation and Business Enterprise Program is the SLA for the State of Colorado. The R-S Act expressly provides SLAs statutory priority for the continued operation of vending facilities and cafeterias on federal property. 20 U.S.C. § 107d(e.).

2. The Competition in Contracting Act (CICA), the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation (DFAR) apply "except in cases of other procurement procedures expressly authorized by statute." 10 U.S.C. § 2304(a)(1)[4], 41 U.S.C. § 330f. The R-S Act is such a procurement procedure. *Automated Comm. Syst. V. U.S.*, 49 Fed. Cl. 570, 577-78 (2001); *NISH v. Rumsfeld,* 348 F.3d 1263 (10th Cir. 2003); *NISH v. Cohen*, 247 F.3d 197 (4th Cir. 2001). Accordingly, the FAR and DFARs regulations do not apply to R-S Act procurements, insofar as they conflict with the R-S Act or its implementing regulations.

3. The SLA is not required to file a pre-award bid protest, because the law does not require the doing of a futile act. Whether filed in the Government Accountability Office, the United States Court of Claims, or other venue, such a protest would be dismissed as not ripe for adjudication.

4. The R-S Act's priority must be implemented by placing an SLA's bid in the competitive range where the bid may be made acceptable through discussions.

5. When a Federal property managing agency evaluating a cafeteria solicitation in which an SLA places a bid, the agency must evaluate the bid pursuant to the R-S Act; it is

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[4] Effective January 1, 2022, 10 U.S.C. § 2304 has been repealed, and replaced by 10 U.S.C. § 3201(a), which provides, in relevant part: "(a) IN GENERAL.-Except as provided in sections 3203, 3204(a),and 3205 of this title and **except in the case of procurement procedures otherwise expressly authorized by statute**, the head of an agency in conducting a procurement for property or services- (1) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this section..." (emphasis added).

impermissible by law for an SLA bid to be evaluated pursuant to "best value" or lowest price technically acceptable offer.

6. The R-S Act priority is not a mere invitation to bid; the R-S Act's priority supersedes preferences such as the HUBZone preference found in more general procurement statutes. *Department of the Air Force*, B-250465.6, June 4, 1993; *Automated Comm. Sys, Inc. v. United States*, 49 Fed. Cl. 570, 578 (2001).

7. The R-S Act requires that a Federal agency, before rejecting an SLA's bid to operate a cafeteria, consult with DoE to seek DoE's determination 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." 20 U.S.C. § 107d-3(a), 34 C.F.R. § 395.33(a).

V. ANALYSIS

A. Schreiver's Waiver Argument Fails – A Pre-Bid Protest Would Be Dismissed by the GAO and the Court of Claims; the Law Does Not Require the Doing of a Futile Act.

In its Pre-Hearing Brief (PH Brief), page (p.) 22-27, Schriever argued that Colorado's complaint should be dismissed because the Solicitation made it clear that the Government reserves the right to award without discussions or without setting a competitive range. PH Brief, p. 23. According to Schriever, the time to object was before Colorado submitted its offer. PH Brief, p. 24. Schriever is incorrect. As previously stated, even if the SLA had filed a pre-award protest, it would be dismissed. The law does not require the doing of a futile act. *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), abrogated on other grounds by *Crawford v. Washington*, 541 U.S. 36 (2004).

In fact, Schriever knows well that if the SLA filed a pre-award protest, it would be dismissed, because, in *State v. United States*, 134 F.Cl. 8 (2017), the Air Force moved to dismiss a pre-award bid protest. The Air Force's motion was granted:

> Protestors allegations arising from the Randolph-Sheppard Act are not ripe for judicial decision because there has not been a determination as to whether State of Texas is entitled to a priority contemplated in accordance with the Randolph-Sheppard Act and the implementing regulations.

State v. United States, 134 Fed. Cl. 8, 26 (2017). As a matter of routine, both the Court of Claims and the Government Accountability Office (GAO dismiss bid protests brought by SLAs. Since 2004, the Court of Claims has repeatedly stated that it lacks jurisdiction to determine cases alleging violations of the R-S Act.[5]

Schriever cites to *N. Carolina Div. of Servs. for Blind v. United States*, 53 Fed. Cl. 147, 165 (2002), *aff'd sum nom N. Carolina Div. of Servs. for Blind v. United States* for the proposition that the SLA, by not seeking a pre-award review of the solicitation terms, has waived that right. Yet the Air Force itself argued against this proposition and obtained a dismissal of the pre-award bid protest. The Panel concludes that it is obvious that the North Carolina case cited above is not dispositive.[6]

Schriever also cites to *Moore's Cafeteria Services v. U.S.*, 77 Fed. Cl. 180, 184 (Fed. Cl. 2007), a case inapplicable because the plaintiff in *Moore's* was a disappointed bidder, ***not*** an SLA.

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[5] *Kentucky v. United States*, 62 Fed. Cl. 445, 460 (2004), *aff'd sum nom. Kentucky Educ. Cabinet Dep't for the Blind v. United States*, 424 F.3d 1222 (Fed. Cir. 2005) ("this court concludes that the statutory scheme of the RSA requires exhaustion of administrative procedures before an aggrieved SLA may raise an RSA claim in this court."); *Colo. Dep't of Human Serv. v. U.S.*, 74 Fed. Cl. 339 (2006) ("The Court of Claims lacks jurisdiction under the Tucker Act and the APA and will not entertain a motion for preliminary injunction pending the outcome of the R-S Act arbitration."). *See also, State of Kansas v. U.S., 192 F.Supp.3d 1184, 1194-95 (D. Kan. 2016), aff'd in part sub nom. Kansas by and through Kansas Dep't for Children & Families v. Source America*, 874 F.3d 1226 (10th Cir. 2017).

[6] While a number of DoE arbitration panels have concluded that waiver principles apply, those decisions are no longer persuasive given the Federal Court of Claims recent jurisprudence.

B. Schreiver's Past Performance Evaluation was Flawed

The awardee, Native, submitted its "Past Performance Matrix" for the period from 03/02/2020 to 08/31/2025. Ex. 15. Yet, the terms of the Solicitation required that:

> The contract (or subcontract) must have been performed within the past five (5) years from the date of issuance of the solicitation (calendar years 2015-2020) for a minimum of a six (6) month period. Past performance outside this given time frame will not be evaluated.

Colorado Ex. 4, p. 112-113. Mr. Ray testified:

> Q: They got 499 out of 500 points without even putting in the necessary prime contractor for at least – on a contract for at least six months.
> A: Yes.

TR I, p. 231. The Panel therefore concludes that Schreiver's past performance evaluation of Native was flawed, to the detriment of Colorado.

C. Schriever Violated the R-S Act by Adding 10% to the Amount of Colorado's Bid, based on HUBZone Preference

Schriever posits, at PH Brief, p. 16-19, that the HUBZone statute, 15 U.S.C. § 657a, is not incompatible with the R-S Act, citing to *Automated Communication Sys., Inc. v. United States*, 49 Fed. Cl. 570 (2001). What Schriever neglects to point out is that the court was stating is that a solicitation can contain both the R-S Act priority and the HUBZone preference. The Court in *Automated* went on to recognize that:

> [w]ithout question, the RSA, which deals with federal vending facilities contracting, is far more specific than the HUBZone Act, which covers government contracting in general.

The *Automated* court went on to explain that "under the basic rules of statutory construction, when more than one statute ostensibly applies, the more specific of the

two controls." Citing to *NISH v. Cohen*, 247 F.3d 197 (4th Cir. 2001), the *Automated* court recognized that the R-S Act priority took precedence over the HUBZone preference.

Next, Schriever cites to the FAR as authority for increasing the SLA's bid by ten percent. Yet the FAR does not apply to an R-S bidder where clearly incompatible with the R-S Act priority. 10 U.S.C. § 2304(a)(1).

Recently, in *Mitchco Int'l v. United States*, 26 F.4th 1373 (Fed. Cir. 2022), the Federal Circuit unambiguously stated that the "Army's treatment of the RSA as trumping the small business provision was not unlawful." *Mitcho* at 1381. In reaching that conclusion, the Federal Circuit relied on *In re Intermark*, B-290925, *NISH v. Cohen*, 247 F.3d 197, *Tex. Workforce Comm'n v. USDE*, WL 8619799 at *11-12 (W.D. Tex. March 28, 2018), and *Automated*.

The Panel concludes that the HUBZone preference does not "trump" the R-S Act, and that its provisions cannot be employed to dilute the R-S Act priority. This accords with the R-S Act's legislative history:

> The insertion of the term "priority" underscores the Committee's expectation that where a vending facility is established on Federal property, it is the obligation of the agency in control of such property, the Secretary of HEW, and the State licensing agency to assure that one or more blind vendors have a prior right to do business on such property, and furthermore that, to the extent that a minority business enterprise or non-blind operated vending machine competes with or otherwise economically injures a blind vendor, every effort must be made to eliminate such competition or injury.

S. REP. NO. 93-937, p. 15. As the GAO explained:

> The solicitation can include a "cascading" set of priorities or preferences whereby competition is limited to small business concerns and the SLA, with the SLA receiving award if its proposal is found to be within the

> competitive range and consultation with the Secretary of Education results in agreement that award should be made to the SLA; otherwise, award will be made to an eligible small business in accordance with the RFP's evaluation scheme. Such an approach would preserve the SLA's superior preference, while according small businesses a preference vis-à-vis large businesses (other than the SLA), to which they are entitled under the Small Business Act and applicable regulations.

In re Intermark, B-290925 (2002).

The Panel thus concludes that Schriever violated the R-S Act when it evaluated the SLA's price as ten percent greater than the SLA's actual bid.

D. The R-S Act Cannot be Voided by Failure of a Federal Agencies to Establish Competitive Range when Evaluating an SLA's Proposal

Colorado is correct that Schriever's failure to establish a competitive range and place Colorado in the competitive range where meaningful discussions could have resulted in Colorado's bid being made acceptable violated the R-S Act. Schriever incorrectly interprets 20 U.S.C. § 107d-3(e). Schriever's interpretation places undue authority in the hands of a contracting officer when evaluating an SLA's bid. The R-S Act directs all Federal agencies to establish, wherever feasible, on or more vending facilities on all Federal property. 20 U.S.C. § 107(b)(2). The only exception is where such vending facility would "adversely affect the interests of the United States." *Id.* Only the Secretary of Education has the authority to determine whether the placement of a vending facility[7] would adversely affect the interests of the United States. *Id.*

The R-S Act's implementing regulation at 34 C.F.R. § 395.33(b) requires that contracting officers establish a competitive range when evaluating contracts that

[7] The term "vending facility" includes cafeterias. 20 U.S.C. § 107e(7).

pertain to the operation of a cafeteria. A contracting officer does not have the authority to eviscerate the R-S Act by simply foregoing the establishment of a competitive range. If all Federal agencies decided to forego the establishment of a competitive range in evaluating all procurements where the R-S Act requires that the SLA be invited to respond for a cafeteria contract, there could be no cafeteria contracts operated by blind vendors. The R-S Act cannot be so interpreted, for to do so would nullify the statute.

Schriever is also incorrect when it states that the FAR does not conflict with the R-S Act. CICA does not apply; neither do FAR nor DFARS. R-S Act regulations apply. At the time regulations were promulgated, the term "competitive range" meant that any proposal "must be considered to be within a competitive range so as to require negotiations unless it is so technically inferior or out of line with regard to price that meaningful discussions are precluded." *To the Sec'y of the Air Force*, 1968 U.S. Comp. Gen. LEXIS 37, 48, 48 Comp. Gen 314 (Comp. Gen November 13, 1968). We must interpret the R-S Act's regulations (adopted in 1977) by reference to how the term "competitive range" was used at the time the regulation was drafted. This Panel must carefully consider the text, structure, history, and purpose of the regulation. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019). When Congress last amended the R-S Act, in 1974, commanders of military installations were found to be "singularly insensitive to the need to develop the Program." S. REP. NO. 93-937, p. 10. The Panel must review how the term "competitive range" was used at the time the regulation was drafted. *District of Columbia v. Heller*, 554 U.S. 570, 581-82 (2008).

According to the 1995 version of 48 C.F.R. § 15.609, "When there is doubt as to whether a proposal is in the competitive range, the proposal should be included." Schreiver's use of the more restricted definition of competition in the current FARS does not implement the R-S Act priority. Since at least 1944, when the Supreme Court in *Skidmore v. Swift Co.*, 323 U.S.134, 140 (1944), decided this issue, agency interpretations reached without benefit of notice and comment procedures may be considered as persuasive evidence:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore v. Swift Co., 323 U.S. 134, 140 (1944). The DOE Handbook (Administration of the Randolph-Sheppard Vending Program by Federal Property Managing Agencies (Handbook), Ex. 10, was issued in 1988, and remained in effect until January 18, 2017, when it was withdrawn, along with numerous other policy issuances that "are outdated due to changes in law, regulations, or reporting requirements resulting from the amendment to the Rehabilitation Act of 1973 made by the Workforce Innovation and Opportunity Act."

The Panel concludes that, because the Handbook has been in effect since 1988, and because the R-S Act has not been amended in the interim, the Handbook is persuasive in determining when and how an SLA's bid is to be considered in the competitive range. Indeed, DoE recently clarified that Chapter VII of the DOE

Handbook "provides valuable to our stakeholders and may continue to be consulted."

Ex. 14. The DoE's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Here, it is evident that DoE has long interpreted the regulation at 34 C.F.R. § 395.33(b) to require an SLA's bid be included in the competitive range, except in very limited circumstances, with the Secretary, or this Panel in her stead, being dispositive of whether the bid should or should not be included in the competitive range.

Accordingly, the Panel concludes that Schreiver's failure to place Colorado's bid in the competitive range violated the R-S Act. Had it done so, based on both Mr. Ray's and Mr. James's testimony, it is likely that Colorado's proposal could have been made acceptable.

E. Schreiver Usurped the Secretary's Authority to Determine, on an Individual Basis, that the Operation Can be Provided at a Reasonable Cost, with Food of a High Quality Comparable to that Currently Provided Employees

34 C.F.R. 395.33(a) provides:

> 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. Such operation shall be expected to provide maximum employment opportunities to blind vendors to the greatest extent possible.

This regulation requires two things of all Federal agencies soliciting bids for cafeteria contracts: First, DoE's Secretary makes the determination, on an individual

basis, that a blind licensee can operate the cafeteria at a reasonable cost, with food of a high quality comparable to that currently provided employees, and secondly, that employment opportunities for blind vendors are to be maximized to the greatest extent possible. Schriever failed on both counts; it made the decision to reject the SLA's bid without submitting the matter to DoE's Secretary, and it eliminated blind vendors' employment opportunities. *Tex. Workforce Comm'n v. U.S. Dep't of Educ., Rehab. Servs. Admin.*, 354 F. Supp. 3d 722, 725 (W. D. Tex. 2018), *Georgia v. United States*, 398 F. Supp.3d 1330 (S.D. Ga. 2019), *Commonwealth v. U.S.*, No.: 04-831C, at *11 (Fed. Cl. Oct. 13, 2004).

F. Schriever's Intention to Reissue the Solicitation Does Not Moot this Dispute

Schriever first issued the Solicitation in June 2020, and Colorado requested an arbitration panel on August 20, 2020. From that point to April 2022, the time of the hearing, Schriever maintained that its award of the contract to Native was proper. No evidence was presented at the hearing that Schriever had decided to reissue the Solicitation. Further, at no time did Schriever request leave to re-open the hearing or supplement the evidentiary record to offer evidence explaining its intent to reissue the Solicitation. The only information regarding Schriever's intent to reissue the Solicitation is found in its post-hearing brief which simply states

> After careful consideration of the procurement records, the Air Force has decided to resolicit the Solicitation in accordance with 34 C.F.R. § 395.33(b). Specifically, the Air Force will evaluate all proposals in accordance with the Solicitation's Evaluation Methodology, Evaluation Factors, and Evaluation Criteria. Upon completion of the source selection, the Air Force will terminate the current award and award to the new best

value awardee. Additionally, the Air Force will take any other form of action it deems appropriate.[8]

There is no statement or assurance in Schriever's post-hearing brief that it intends to give Colorado the statutory priority it is due under the R-S Act.

Generally, a case is rendered moot when there is no longer a justifiable dispute. If a defendant voluntarily terminates the allegedly unlawful or improper conduct after the claim has been filed but retains the power or authority to resume the challenged practice at any time, a federal court may deem the case non-moot. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000). Schriever, the party asserting the dispute moot, has the heavy and formidable burden of persuading the panel that subsequent events make it absolutely clear that the allegedly wrongful behavior cannot be expected to reoccur. *Id., citing United States v. Concentrated Phosphate Export Ass'n, Inc.*, 399 U.S. 199, 203 (1968). Courts support this corollary to the mootness doctrine because there is a public interest in making sure that a defendant is not "free to return to his old ways" and having the legality of the practices settled. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

Schriever has not provided the panel with any evidence demonstrating that its intent to reissue the Solicitation will honor R-S Act's priority due to a SLA. Without this assurance, Schriever's intent is simply a "do-over" that provides Colorado no assurance that it will receive the statutory priority contained in the R-S Act. Without this assurance, Colorado's dispute remains active and unresolved. For this reason,

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[8] Schriever's *Post-Hearing Brief* at p. 1.

the panel declines to find, as a matter of law, that this dispute is moot or has been rendered academic.

VI. CONCLUSION

Schriever's pre-and post-hearing requests for dismissal are denied. Schriever did not correctly evaluate Colorado or Native's bid, it incorrectly applied the HUBZone preference, and it incorrectly applied the R-S Act priority. Moreover, Schriever did not consult with the Secretary of Education at any time about whether the Colorado could provide good food at a reasonable price. The Panel Majority finds that Schriever violated 34 C.F.R. § 395.33(a) when it failed to consult with the Secretary of Education. Further, it finds that even if the state licensing agency's bid is not within the competitive range set by the contracting agency, the matter still must be returned to the Secretary to decide, after consulting with the contracting agency, if the blind vendor can provide an operation at a reasonable cost, with food of a high quality. The statutory and regulatory scheme make it clear that an SLA's bid cannot be rejected without consulting with the Secretary of Education who makes the final decision. 34 C.F.R. § 395.33(a).

VII. AWARD

A. The solicitation at issue in this case pertains to the operation of a cafeteria and is therefore subject to the requirement of the R-S Act and its implementing regulations.

B. Schriever violated the R-S Act and its implementing regulations when it failed to properly apply the R-S Act priority for blind vendors to the Solicitation and Contract at issue in this arbitration.

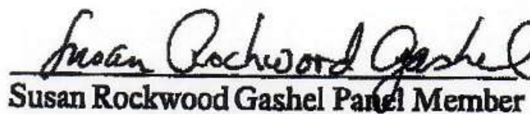
C. Schriever violated the R-S Act and its implementing regulations in failing to maximize opportunities for blind vendors.

D. Schriever shall cause the acts or practices found by this Panel to be in violation of the R-S Act and its implementing regulations to be terminated promptly; and shall take such other action as may be necessary to carry out the decision of the Panel Majority.

E. To that end, the Panel Majority finds as a matter of law that the Schriever is obligated under the R-S Act and its implementing regulations to resolicit the Solicitation at issue and grant the SC and its blind vendor the priority afforded by the R-S Act.

Dated: September 29, 2022.

Diego J. Peña, Panel Chair



Susan Rockwood Gashel Panel Member

J. Mackey Ives, Panel Member