

April 15, 1996

P.S. Protest No. 96-04

ILLINOIS DEPARTMENT OF REHABILITATION SERVICES

Solicitation No. 162745-96-A-0103

DIGEST

Protest against terms of solicitation for cafeteria services is denied; Randolph-Sheppard Act and its implementing regulations do not support State Licensing Agency's contentions that vending machines which comprise part of the solicited cafeteria should be made available for blind operation under license or that income from those machines should be distributed to the blind licensee.

DECISION

The Illinois Department of Rehabilitation Services (DORS) protests the terms of a solicitation for a cafeteria for a new Chicago postal facility, asserting that the solicitation fails to comply with provisions of the Randolph-Sheppard Act, 20 U.S.C. 107 *et seq.* (the Act).¹

¹ The Act authorizes and affords a priority to licensed blind persons to operate vending facilities on Federal property. 107(a),(b). The Act's implementing regulations were initially issued by the Secretary of Health, Education, and Welfare 45 CFR Part 1369 (1977), and were subsequently transferred by reorganization to the Secretary of Education, 34 CFR Part 395; 20 U.S.C. 107a note. Citations herein in the form 107 are to the Act; citations in the form 395 are to the regulations.

Section 395.1(x) defines "vending facility" as

automatic vending machines, cafeterias, snack bars, cart service, shelters, counters, and such other appropriate auxiliary equipment which may be operated by blind licensees

and which is necessary for the sale of . . . food . . . and other articles or services dispensed automatically or manually

Further, the Act directs the Secretary of Education 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, . . . that such operation can be provided at a reasonable cost with food of a high quality . . . , whether by contract or otherwise." 107d-3(e).

The regulations define "cafeteria" as:

a food dispensing facility capable of providing a broad variety of prepared foods and beverages (including hot meals) primarily through the use of a line where the customer serves himself from displayed selections. *A cafeteria may be fully automatic* or some limited waiter or waitress service may be available and provided within a cafeteria and table or booth seating are [sic] always provided.

395.1(d). (Emphasis provided.)

The regulations provide that priority is to be afforded to the blind in the operation of cafeterias when the Secretary determines, on an individual basis, that a blind vendor can provide "at reasonable cost . . . food of a high quality." 395.33(a). While agencies may negotiate directly with SLAs for the operation of cafeterias by blind licensees (395.33(d)), SLAs are to be "invited to respond to solicitations for offers when a cafeteria contract is contemplated." All offers are evaluated against the evaluation criteria of the solicitation, and if the SLA's offer "is judged to be within a competitive range and . . . ranked . . . among those . . . which have a reasonable chance of being selected for the award," the agency is to consult with the Secretary about affording the offer priority consideration. 394.33(b).

The preamble adopting the cafeteria provisions included the following elaboration of the concerns addressed in the rulemaking:

Comments from blind vendor groups . . . indicated a belief that the proposed regulations had failed to provide for an adequate priority [for the operation of cafeterias by the blind]. Comments from certain Federal . . . agencies and from representatives of the food service industry, on the other hand, indicated a feeling that the proposed regulations reflected too vigorous a priority for the blind and provided too great an advantage for a public agency in its competition with private industry.

Additional comments requested that "cafeteria" be defined specifically for purposes of the Randolph-Sheppard program

In response a definition of "cafeteria" has been added . . . in order to distinguish cafeterias from other types of vending facilities covered by the Act. To provide this necessary clarification, a cafeteria is now defined as a food dispensing facility where the customer serves himself prepared foods and beverages from displayed selections and eats at tables or booths which are located within the premises.

A cafeteria is characterized by the very broad range of food selections available to patrons -- including hot meals. A facility serving only such food items as hamburgers, hot dogs, sandwiches and other light snacks is not considered to be a cafeteria.

Solicitation 162745-96-A-0103 was issued on January 16, 1996, with an offer due date of February 13, for a cafeteria to be operated at the new Chicago Mail Processing Center. According to the solicitation, the cafeteria is to be operated in a location seating 500, eighteen hours a day, seven days a week.² The solicitation requires the contractor to provide, *inter alia*, "a broad variety of prepared foods and beverages including hot meals" whose "variety of quality and appearance . . . must be consistent with approved food service industry standards for comparable 'in plant' cafeterias." An attachment to the solicitation identifies a two-week rotating list of entrees, including a meat dish, two kinds of potatoes, and two vegetables, as a "representative menu." Although Section B.2 of the solicitation states that the "type of cafeteria required is: MANUAL,"³ it also provides that the

A cafeteria is also characterized by the fact that the patrons sit at either tables or booths to eat their meals. Although service personnel are usually on the premises and limited waiter or waitress service may be available, *a cafeteria may be a fully automated facility consisting of a number of vending machines*. In such a case the facility is considered to be a cafeteria because of the range of food items available for sale and because of the location of seating arrangements within the facility.

In order to ensure that blind vendors are afforded a significant priority in the awarding of contracts for the operation of cafeterias on Federal property, [395.33] has been revised to emphasize that when an offer submitted by a State licensing agency for the operation of a cafeteria is determined to be within the competitive range, the contract is expected to be awarded to the State licensing agency. Contract awarding . . . does not require the State licensing agency to be the best overall bid submitted for operation of the cafeteria.

42 Fed. Reg. 1589 (1977). (Emphasis added.)

² According to the solicitation, the facility will employ approximately 3900 employees on three shifts (tours); cafeteria use by tour is said to range from 85% to 90%.

³ Two Postal Service handbooks involve food services; Handbook AS-707H, Contracting for Food Services, January 1991, and Handbook EL-602, Food Service Operations, August 1994. Both handbooks make reference to the Act and adopt definitions and procedures related to the Act and the implementing regulations of the Secretary.

AS-707H 151 defines "cafeteria" in terms consistent with the Secretary's designation, and categorizes them further. A "manual cafeteria [is] a cafeteria where food is prepared on-site and obtained through a serving line similar to a commercial cafeteria" (151.3), as contrasted with a "vending cafeteria . . . where customers serve themselves from vending machines. . . ." (151.3.)

EH-602 12.a states that "[a] cafeteria may be manual, manual with supplemental vending, fully automatic, or provide some limited waiter or waitress service."

Vending facilities other than cafeterias include central lunch rooms, which vend no more than one hot or cold food meal (AS-707H 152.2 a., EL-602 12.b), and "auxiliary" or "satellite" vending, involving snack or beverage vending machines located close to work areas and separate from the principal food service area. AS-707H 152.1 a., EL-602 231.

contractor "may place up to nineteen vending machines." Discussion in the course of a pre-proposal conference, a transcript of which was provided to prospective offerors, makes it clear that these vending machines are to be located in the cafeteria.

The protest, timely filed February 9 with the contracting officer, who forwarded it to this office, asserts that the placement of vending machines within the cafeteria violates the requirements of 107(b) of the Act, which the protester states requires that

priority be given to blind persons licensed by the State [Licensing] Agency [(SLA)] in the operation of vending machines on Federal property, and

[that] whenever feasible, one or more vending facilities [be] established on all Federal property to the extent that any such facility would not adversely affect the interests of the United States.

The protester asserts that the vending machine portion of the solicitation is subject to the portions of the Department of Education regulations implementing the Act pertaining to permits, and that it intends to submit a permit application for the vending operation.

The contracting officer's statement responding to the protest notes that although it had not chosen to participate in the competition to operate the cafeteria, the protester has elected to operate some 27 vending machines located at nine satellite vending sites within the Mail Processing Center outside the cafeteria, and that these machines "meet[] the requirements of the . . . Act." Further, he quotes section 232 of Handbook EL-602 as stating that "manual cafeterias may include vending machines to make the total requirements package economically attractive to potential food service contractors" and explains that "to make the total requirements package economically attractive to potential food service contractors" vending machines operated on a break-even basis are included within the cafeteria. Those machines, he asserts, are not subject to the income-sharing provisions of the Act.

According to the contracting officer, other facilities have lost their cafeterias because they did not have vending machines, and "only the current Chicago Main Post Office and the Chicago Bulk Mail Center have ongoing long-term contracts for manual cafeterias, partly due to the fact that these two locations have vending machines located within the manual cafeteria area. . . ." The contracting officer asks that the protest be denied.

Replying to the contracting officer's statement, the protester contends that the vending machines to be included in the cafeteria will be in direct competition with the machines which it intends to operate, and that it is entitled to receive income sharing from those machines.⁴

⁴ The Act provides for the accrual of certain income from "the operation of vending machines on Federal Property" to the blind licensee operating a vending facility on that property, or, if none, to the SLA. If the vending machine is in "direct competition" with a blind vending facility, 100% of the vending machine income is to accrue; otherwise 50% or 30% of the vending machine income is to accrue. 107d-3(a),(b).

The Secretary's regulations define "vending machine income" as "receipts . . . after deducting the cost of goods sold (including reasonable service and maintenance costs . . .) . . ." 395.1(z).

The Postal Service acknowledges the entitlement of blind vendors to receive all of the "vending

The protester asserts that there is no exception to income sharing for "vending supplements to a cafeteria," and that Handbook EL-602 "reinforces the rights that the blind vendors have to receive income sharing from such cafeteria vending machines." The protester complains that the contracting officer does not support, with documentation, his "assumption" that the cafeteria "cannot be profitable without supplemental vending," instead relying on "vague references to other postal sites."

Further, DORS asserts that there is no authority for the proposition that vending machines which are part of the cafeteria are not subject to income-sharing if they are operated on a break-even basis. The protester further asserts that such a proposition would be illogical, because the machines would have to be operated "at a profit in order to allow the cafeteria to be more attractive to potential contractors" and because section F.1 of the solicitation requires a payment of 1.5% of net sales per month to the Postal Service. "[I]f the Postal Service can claim its percentage of sales, why cannot the blind vendor claim the legal right to income sharing?"

DORS asks that the solicitation be amended to exclude the vending machines, "thus recognizing the priority contained in the Randolph-Sheppard Act of blind vendors to operate the vending machines on this federal site."

In rebuttal, the contracting officer denies that the machines to be placed in the cafeteria will be in direct competition with the DORS machines. He states that the cafeteria will be on the third floor, "well away from the nine sites that have been given to DORS for satellite vending areas." The contracting officer states that the "closest DORS satellite vending site

[machine] income" from machines which are in direct competition with the blind vending facility. EL-602 413.1. The Postal Service defines "vending machine income" as "the commission paid by a commercial vending concern that operates, services, and maintains vending machines on postal property," but not including "the operating fee of 1.5 percent of net sales due the Postal Service." EL-602 412.1.

Some postal food services are to be operated on a "break-even basis" with "no commission to the Postal Service" except for the 1.5% operating fee. AS-707H 151.5. The fee, which is "in lieu of reimbursement for equipment depreciation and normal building services," is charged "[b]ind or sighted contractors . . . operating manual or vending food service facilities" It is not charged to blind licensees operating under a permit. AS-707H 225.

Cafeterias . . . are operated on a break-even basis; neither the Postal Service nor any employee social and recreational committee may make a commission, and the contractor must redistribute any excess in allowable commission or administrative expense to customers through reduced prices.

Commercially operated snack vending machines that are remote from lunchrooms and cafeterias are operated on a commission basis. Commissions paid to [the] Postal Service from vending machines are first shared with the state licensing agency; the balance of that revenue goes to the employee social and recreational committee.

EL-602 112.3.

. . . is about . . . 48 feet from the cafeteria" and that employees "seeking a vended product are likely to get that product from a vending machine near their location rather than walk a lengthy distance to the cafeteria" so that the cafeteria vending machines "are not in direct competition with the machines placed at the nine DORS satellite locations." The contracting officer makes the following additional points:

-- DORS is incorrect that the Postal Service is receiving income from the vending machines; "there are no commissions paid to the Postal Service to share with the state licensing agency."

-- The "break-even" policy" refers to the commission relationship between the vendor and the Postal Service, and not to the profit which the vendor can make"

Ace Coffee Bar, Inc., which has submitted a proposal, expresses its opinion "which is based on many years of food service experience in our marketing area." Ace asserts that it previously had to terminate its agreement to operate a cafeteria at the Carol Stream General Mail Facility due to lack of profit. "Without vending revenue, we found that we could not produce acceptable financial operating results. . . ." Ace asserts that if the vending machines are removed from the current solicitation, "we would have no choice but to withdraw our proposal," explaining as follows:

Postal cafeteria operations are labor intensive programs due to the extended hours of operation required at your locations. The revenue generated through automated vending programs is required to offset the cafeteria operating deficit. Without the subsidizing income from vending we cannot foresee any reasonable operating format which would enable us to consider accepting any service contracts of this nature.

DISCUSSION

Resolution of this dispute requires a closer examination of the provisions of the Act and its implementing regulations than either the protester or the contracting officer has provided. That examination demonstrates that the protester's contention that it is entitled to operate the cafeteria vending machines under permits, or alternatively, that it is entitled to the income from those machines, cannot prevail.

Central to this conclusion is the distinction which the Secretary's regulations make between cafeterias and other vending facilities. As discussed in footnote 1, *supra*, priority in cafeteria operation is afforded the blind in a competitive contracting context; the blind are afforded a priority in operating "vending facilities other than cafeterias" (395.45) by applying to the applicable federal agency for permits. This distinction maintains under the regulation even though the cafeteria may be "fully automatic," that is, comprised exclusively of vending machines, as long as it meets the other necessary criteria such as the provision of a broad range of foods and the inclusion of a seating area. The hybrid facility solicited here is similarly a cafeteria; there is no basis on which the portions of the service to be provided by machine can be separated from the other portions.

While there has been no Department of Education arbitration panel decision directly on point, *dicta* in one indicated that a cafeteria which consisted partially of vending machines (as opposed to a fully vended facility) and which was operated on a break-even basis would not violate the intent of the Randolph-Sheppard Act. *In the matter of Arbitration between the Department of Rehabilitation, State Licensing Agency of the State of California and the U.S. Postal Service*, April 24, 1984.

DORS' alternative position, that it or its licensee is entitled to share in the income from the cafeteria vending machines, is also unpersuasive. First, given the distinctions drawn by the regulations between cafeterias, on the one hand, and other vending facilities, including vending machines, on the other, the provisions of the regulation dealing with vending machine income are not applicable to cafeterias. Second, in any event, under the "break-even" policy reflected by the solicitation, no income (commission) will be available for payment.⁵

We find incidental corroborating support for this conclusion in the Randolph-Sheppard regulations of the Department of the Interior. Those regulations, 43 CFR 13.5(a),(d), provide protection for blind vendors from "direct competition from other vendors or vending machines on [Interior] property," but exclude from that protection "the sale and service of food . . . usually sold in connection with meals by cafeterias, restaurants, or similar food dispensing establishments."

While it plays no part in our decision, we note our disagreement with the contracting officer's contention that the cafeteria vending machines will not be directly competitive with the vending machines in the satellite vending areas. But for the fact that they are part of a cafeteria, they fully meet EL-602 413.2's definition of "direct competition"; that is, they are in the same building with the blind vendor and they are not "located to provide nearby service to employees[] the majority of whom normally do not have direct access to the blind vendor"

The protest is denied.

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⁵ The Postal Service's definition of income expressly excludes the operating fee. Under the Secretary's regulations the fee seems properly excludable from vending machine income as a reasonable service or maintenance cost.