

NCSAB

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Senator Michael Enzi, Chairman
Senate Health, Education, Labor and Pensions Committee
428 Dirksen Senate Office Building
Washington, DC 20510

October 5, 2006

Dear Chairman Enzi,

We, the national organizations working on behalf of blind Americans, are writing to convey our concerns about the recommendations proposed by the Joint Committee of the Department of Defense, Department of Education, and Committee for Purchase regarding application of the Javits-Wagner-O'Day (JWOD) Act and the Randolph-Sheppard (RS) Act. We understand that the Congress requested the Joint Committee report in hopes of receiving recommendations that would resolve the conflict between the two programs in the arena of military dining. *We believe that the recommendations significantly restrict opportunities for blind vendors under the RS Act and will increase, rather than eliminate, contention and litigation.* We offer for your consideration the following philosophical concerns about, and specific objections to, the Joint Committee's recommendations.

Philosophically, we object to the approach taken by the Joint Committee to the Randolph-Sheppard program and the blind vendors who provide services through it.

The current scope of the Randolph-Sheppard Act is already very narrow. The universe of set-aside contracts to which the JWOD program applies includes more than 21,000 products and services, and represents a multi-billion dollar industry. The Randolph-Sheppard cafeteria contract priority applies only to food service. Numerous contracts for services on the JWOD procurement list have been awarded to NISH agencies that, under the scope of current policy and federal appeals court decisions, should have been subject to the Randolph-Sheppard priority. Blind vendors under the Randolph-Sheppard Act seek only to preserve their priority for a very small piece of federal contracting, and are not attempting to expand the priority to other goods or services.

Implementation of the Joint Committee recommendations further narrows the scope of Randolph-Sheppard in a manner that is inconsistent with current law,

policy and court decisions. Current Department of Education policy, Department of Defense policy, and at least two court decisions recognize the priority of the Randolph-Sheppard Act, stating that RS covers all types of food service operations on military bases, including military troop dining facilities. Further, the courts have held that when there is a conflict between RS and JWOD, the Randolph-Sheppard Act takes precedence because the Randolph-Sheppard Act sets forth a priority, or prior right, while JWOD provides only a general preference. The Joint Committee's recommendations can only be characterized as extra-legal, since they would lock into place protections for JWOD contracts to which the RS priority should apply. If the Joint Committee recommendations are implemented, the result will be a significant shift of contracting opportunities away from blind vendors.

Randolph-Sheppard receives no benefit or expansion to offset the proposed restrictions. There is nothing in the Joint Committee's report that offers any benefits to the Randolph-Sheppard program or its vendors. This proposal causes blind vendors to give up protection and priority under current law, and gain nothing in return.

To assist in the Committee's understanding of and discussions regarding the Joint Committee's proposal, we offer the following detailed analysis of specific recommendations contained in the Joint Policy document:

1. The "no poaching" provision does not maintain the current distribution of contract opportunities.

Paragraph 3 of the Joint Committee report recommends a "no-poaching" provision that purports to maintain "the current distribution of contract opportunities." This provision fails to maintain the current distribution of contract opportunities, for the following reasons:

- In fiscal years '04, '05 and '06 the National Defense Authorization Act carried "no poaching" language that made the RS Act inapplicable to contracts on the JWOD Procurement List only for the life of the contract with option years. Unlike that language, the Joint Committee's proposal allows current JWOD contracts to be retained in perpetuity, regardless of the type of contract currently on the procurement list, while RS contracts would be put up for competitive bid at the expiration of the current contracts. At a minimum, the Joint Committee could have decided to solicit competitive proposals for operation of military dining facilities on the procurement list when the contract and its option years expires, just as current Randolph-Sheppard contracts will be recompeted. However, the Committee did not recommend this more even-handed approach.

- When current Randolph-Sheppard contracts expire, they are protected only by the Randolph-Sheppard law, and not by the provisions of the “no poaching” policy. However, the Joint Proposal recommends redefining “cafeteria” in a way that significantly narrows the scope of work to which the Randolph-Sheppard Act applies. The combination of protection only for current contracts, the fact that Randolph-Sheppard contracts expire and will be recompeted as “new” contracts, and the re-definition of “cafeteria” will likely result in a significant shift of contracts from Randolph-Sheppard to JWOD. (For a more detailed discussion of the proposed definition of “cafeteria,” please see number 2 below.)
- Under current law, DOD has the option to negotiate with SLAs to renew contracts that have been carried out successfully. Under the Joint Committee’s proposal, language included in paragraph 8 would require DOD to solicit competitive proposals when current RS contracts expire. The restriction on direct negotiation will increase, rather than reduce, the contracting burden faced by the DOD, and could also result in loss of contracts to Randolph-Sheppard vendors.

The Joint Policy Statement characterizes the “no poaching” provision as a maintenance of the status quo all parties. However, under current law as interpreted by the courts, the proposal represents a certain reduction in the contracts eligible for priority under Randolph-Sheppard.

2. Relative to current law, the Joint Committee proposal significantly narrows the scope of new contracts to which the Randolph-Sheppard priority would apply.

In the 1990s, the Department of Defense and JWOD proposed essentially the same definition of “cafeteria” that is included in paragraph 4a of the Joint Committee report to govern which new contracts should receive priority under the Randolph-Sheppard Act. Then, as now, the suggestion was made that contracts should be competed under RS only when the DOD solicits a contractor to exercise management responsibility and day-to-day decision-making for the overall functioning of a military dining facility, including responsibility for its staff and subcontractors, and where the DOD role in the contract is generally limited to contract administration functions described in the Federal Acquisition Regulation. At that time, the Department of Education fought to define “cafeteria” more broadly, so that it would encompass contracts for full food service, food preparation services, food serving, ordering and inventorying of food, meal planning, etc. The Department of Education pushed for the more expansive definition in order to increase opportunities for SLAs to bid on contracts on behalf of blind vendors. Ultimately, the Department of Education’s policy position was upheld by the federal courts.

The definition proposed by the Joint Committee in paragraph 4a to determine which new contracts would be subject to Randolph-Sheppard priority returns to that proposed more than a decade ago by DOD and JWOD. The effect of the proposed redefinition takes away from Randolph-Sheppard several types of food service operations which Department of Education policy and the courts agree are covered by the Randolph-Sheppard Act. Under current policy and court decisions, the dining services listed in the Joint Policy Committee's example (food preparation services, food serving, ordering and inventorying of food, meal planning, cashiers, mess attendants, or other services that support the operation of a dining facility) would be viewed as operation of a cafeteria, and made the contract subject to the RS priority.

3. The Joint Committee proposal appears to mandate that Randolph-Sheppard vendors subcontract with JWOD, creating a competitive disadvantage for SLAs bidding against other contractors without the same requirement.

Paragraph 5 of the Joint Committee's proposal states that "if dining support services are on or will be placed on the Procurement List, any State licensing agency that is awarded a contract for operation of that military dining facility under the R-SA shall award a subcontract for those services." We have several reservations about this provision. First, the recommendation appears to prevent Randolph-Sheppard vendors from carrying out these services with their own employees, or from subcontracting to other blind vendors or teaming partners. Once again, this limits opportunity for blind vendors. Second, this mandate appears to apply exclusively to Randolph-Sheppard vendors bidding on prime contracts, and not to other private contractors submitting bids. This provision may create a significant competitive disadvantage for SLAs, since JWOD contracts are consistently 8-10% above competitive market prices.

When combined with the recommendation (discussed below, number 6) that narrows the competitive range and requires SLA proposals to be within 5% or \$1 million of the "best value" proposal, a mandate to subcontract with higher-priced JWOD subcontractors is particularly troubling. The result would be to make SLAs less competitive, and likely reduce the number of contracts available for blind vendors. We recommend that blind vendors be encouraged to negotiate subcontracts with persons with disabilities employed by NISH and NIB facilities, rather than forced to use services placed on the Procurement List when the result could be diminished opportunities for blind vendors.

4. The proposed policy appears to prohibit blind vendors from operating more than one military dining facility, reducing income potential for blind vendors and significantly complicating contracting for multi-facility operations.

In some cases, particularly where military installations are very large, a single contract for food services may include management of multiple dining facilities. Clearly, having a single contract with the SLA for management of multiple facilities on a single base simplifies contracting for DOD; similarly, a single contract with a blind vendor simplifies contract administration for the SLA and makes its proposal more competitive.

Paragraph 6 of the Joint Committee report states that “through its rule-making procedures ED will encourage State licensing agencies who assert the R-SA "priority" for a multi-facility contract for operation of military dining facilities to assign at least one blind person per military dining facility in a management role." This provision will complicate contract administration for SLAs, and potentially create a competitive disadvantage for SLAs bidding on military contracts. It is also likely to reduce the income for the blind vendor, depending on the type of multi-facility contract to be divided among multiple individuals. This policy implies that blind vendors are making too much money in DOD contracts and are not assuming management positions on these contracts, presumptions that are incorrect and insulting.

5. The proposed language regarding regional contracts undermines the application of Randolph-Sheppard to DOD contracts and would further reduce opportunities for blind vendors.

DOD efforts to streamline contracting and reduce the procurement workload have resulted in increasing use of regional contracts for the operation of military dining facilities at multiple installations across state lines. Current policy clearly states that the Randolph-Sheppard Act applies to these regional contracts. One or more SLAs can bid on a regional contract, and assign work to individual blind vendors in each state covered under the contract. The Joint Committee recommends that the Department of Defense be given the discretion to remove from Randolph-Sheppard subcontracts for the operation of individual dining facilities within a regional contract. It is unclear how this recommendation would be implemented, but its likely effect would reduce the number of contracts to which Randolph-Sheppard priority would apply. Would SLAs be eligible to bid only on those facilities not designated by DOD for subcontract opportunities? There appears to be no limitation on the type of facility DOD may designate for subcontracting opportunities under the Small Business Act or JWOD, including operation of a military dining facility as defined in paragraph 4a, thus further eroding the Randolph-Sheppard priority.

6. Proposed regulatory changes to narrow the competitive range are far more restrictive than those applied to other socially disadvantaged groups and essentially eliminate the Randolph-Sheppard priority.

Current regulations state that in order to be awarded a contract under the Randolph Sheppard priority, the SLA's proposal must be within "a competitive range" and "has been ranked among those proposals which have a reasonable chance of being selected for final award." The regulatory changes proposed by the Joint Committee are much more restrictive, including requiring that the proposal be among the "highly ranked" final proposal submissions.

Of greater concern, the Joint Committee would require definition of "fair and reasonable price" and require that the SLA's final proposal revision does not exceed the "best value" by more than 5% or one million dollars, whichever is less, over all performance periods required by the solicitation. On large contracts, one million dollars may represent 1-2% of the overall contract value, creating a very narrow competitive range and increasing the likelihood that SLAs will not make the cut. The requirement to be within 5% or \$1 million is significantly narrower than the price preference of 10% that is afforded to contracts under the priority for Alaska Native Corporations, for example. It is particularly ironic that blind vendors would be required to stay within this narrow range, while being mandated to subcontract with JWOD agencies that receive an 8-10% premium on delivery of their services.

The net effect of narrowing the competitive range to this degree is to make the Randolph-Sheppard priority essentially meaningless. It is unclear why Randolph-Sheppard, alone of all the programs giving contracting priority to Alaska Natives, minority-owned business, JWOD, and other socially disadvantaged groups, should face such cost restrictions.

7. Creation of additional recommended loopholes would further undermine the Randolph-Sheppard priority.

Finally, the Joint Committee recommends that contracting officers be permitted not to make awards to the State Licensing Agency when the head of the contracting activity determines that award to the SLA would adversely affect the interests of the United States, and the Secretary of Education approves the determination. There is no discussion of what circumstances might constitute "adverse effect" on national interests. If the contracting officer decides that contracting with an SLA is inconvenient, does that constitute an "adverse effect?" We have no confidence that the Department of Education will act to defend the interests of blind vendors under the Randolph-Sheppard Act, having been told by Department officials that their responsibility is to "administer" the law and not "advocate" for it. Blind vendors have no desire to undermine the interests of the United States, but it is difficult to foresee a situation in which letting a subcontract to a blind vendor would threaten or undermine national security. This vast, vague and unjustifiable loophole is simply unacceptable.

In sum, the Joint Committee's recommendations reflect traditional JWOD and DOD Logistics policy views concerning how the two Acts ought to operate. These views were rejected when they were raised in the early 1990s, and should be rejected again for the reasons stated above.

We appreciate your consideration of these comments, and welcome the opportunity to respond to questions, clarify or expand on any of the information provided.

Sincerely,

/S/

Allen C. Harris, President
National Council of State Agencies for the Blind

On behalf of:

The American Council of the Blind
The National Association of Blind Merchants
The National Council of State Agencies for the Blind
The National Federation of the Blind
The Randolph Sheppard Vendors of America