

Protest of)	
)	Date: October 11, 1991
ILLINOIS DEPARTMENT OF)	
REHABILITATION SERVICES)	
)	
Solicitation No. 169990-90-A-0188)	P.S. Protest No. 90-72

DECISION

The Illinois Department of Rehabilitation Services ("DORS")^{1/} protests that it was not given priority to operate the vending machines in the Main Post Office in Chicago pursuant to the Randolph-Sheppard Act (20 U.S.C. ' 107(b)(1) (1988)).^{1/} Solicitation No. 169990-90-A-0188, issued by the Central Procurement and Materiel Management Service Center on September 17, 1990, was for the operation of a cafeteria at the Chicago Main Post Office Building, 48 vending machines at 16 sites within the Main Post Office, and 110 vending machines at 49 post office stations and branches throughout Chicago. The solicitation had an offer due date of October 31, 1990, as amended.^{1/}

On October 24, 1990, DORS filed a timely protest with the contracting officer alleging that the solicitation package violated the Randolph-Sheppard Act by failing to give priority to blind vendors to operate the vending facilities at the Main Post Office. DORS also protested the inclusion of the 48 machines in the Chicago Main Post Office in this solicitation.

The contracting officer found that the protest was without merit and denied it on November 5. The contracting officer based the decision on the understanding that the Postal Service had not violated Section 107 of the Randolph-Sheppard Act since it had

^{1/}DORS is the State Licensing Agency ("SLA") designated under the Department of Education's regulations to administer the blind vendor program in Illinois.

^{2/}The Randolph-Sheppard Act ("Act"), as amended, provides blind persons with paying jobs and the opportunity to be self-supporting.

^{3/}The contracting officer notes that the procurement was conducted pursuant to the Postal Contracting Manual (PCM) because procedures for structured buys for cafeteria and vending services had not yet been issued pursuant to the Procurement Manual, the PCM's successor. As a PCM procurement, the protest procedures at PCM 2-407.8 apply.

previously granted 16 permits to DORS to operate vending facilities at the Main Post Office.^{1/} The contracting officer interpreted the "one or more vending facilities" language of the statute to mean that the Postal Service is required to offer some, but not all, of the vending facilities to DORS. Since DORS had been granted 16 permits to operate thirteen vending machine facilities, two package stands, and one snack bar four years earlier, the contracting officer concluded that no new sites were required to be offered to DORS.

On November 15, 1990, DORS timely filed this protest with our office appealing the contracting officer's decision.^{1/} DORS claims that the contracting officer erred as a matter of law by failing to give priority to blind vendors in the operation of the vending machines and by including the operation of the cafeteria and 49 other locations in the solicitation.^{1/}

In its protest, DORS alleges that the previous grant of permits for 16 sites is not sufficient to comply with the Act. DORS contends that a federal agency has an obligation to establish an appropriate number of vending sites on federal property, whether one or more, depending on appropriate space and available patronage. Blind vendors must then be given priority on all established sites as required by the Department of Education's regulations.^{1/} DORS states that "priority" under these circumstances means "exclusivity."^{1/}

^{4/}Section 107(b) of the Randolph-Sheppard Act provides, in pertinent part:

In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency as provided in this chapter; and the Secretary, through the Commissioner, shall . . . prescribe regulations designed to assure that - (1) the priority under this subsection is given to such licensed blind persons (including assignment of vending machine income pursuant to section 107d-3 of this title to achieve and protect such priority), and (2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States.

^{5/}On February 8, 1991, DORS requested a stay in the protest proceedings while negotiations with the Postal Service over this matter took place. On August 22, DORS informed us that the negotiations had not been successful and requested that we reopen the record for a decision.

^{6/}DORS states that it is not seeking to operate the cafeteria or the vending machines at the 49 Postal Service stations and branches.

^{7/}The Department of Education's regulations provide:

(a) Each department, agency, or instrumentality of the United States in control of the maintenance, operation, and protection of Federal property shall take all steps necessary to assure that, wherever feasible, in light of appropriate space and potential patronage, one or more vending facilities for operation by blind licensees shall be located on all federal property [p]rovided that the location or operation of such facility or facilities would not adversely affect the interests of the United States. Blind persons licensed by State licensing agencies shall be given priority in the operation of vending facilities on any Federal property.

34 C.F.R. Sec. 395.30.

^{8/}In support of this point, DORS cites In the Matter of Arbitration between Mississippi Vocational

DORS claims that the Postal Service failed to follow its own procedures in this matter. DORS points to Section 133 of Handbook AS-702, entitled Contracting for Food Services, which states that "[b]efore sending the Contracting Officer any requirement for a vending facility (other than cafeteria), the regional employee relations division notifies the state agency. If the state agency wants a permit to operate the facility, all details are worked out between the division and the agency."

DORS states that according to Section 107(b) of the Act^{4/} as well as Postal Service regulations,^{1/} the only instance in which the Postal Service can restrict a SLA's operation of the machines is if it can demonstrate to the Secretary of DOE, in advance of such restriction, that the interests of the United States would be adversely affected by such operation. DORS states that the Postal Service has not asserted this exception and has not argued that the space and patronage are inadequate to support a vending facility.

Finally, DORS argues that under the Randolph-Sheppard Act and the implementing regulations, cafeterias are treated differently than vending facilities and therefore cannot be included in the same solicitation with vending facilities. DORS further argues that the inclusion of the 49 "far ranging and unconnected" vending facilities in the solicitation limits the interest of a blind vendor, and is, in effect, "a limitation on the location or operation of a vending facility which must be approved by the Secretary of [DOE]." 20 U.S.C. ' 107d-3(e) (1988); 34 C.F.R. ' 395.33 (1990). DORS claims that the Postal Service has offered no reason why these locations should be grouped in one solicitation nor has it sought Secretarial approval of a limitation. DORS argues that as a result, these 49 vending facilities and the cafeteria cannot be grouped with the vending machines at the Main Post Office. DORS states that blind vendors have a priority to the 16 vending sites at the Main Post Office and that the Postal Service must offer these facilities to DORS separately on a permit basis.

Rehabilitation for the Blind and National Aeronautics and Space Administration, May 22, 1990, in which the arbitration panel stated:

No limitation is placed on the number of vending facilities on a particular piece of Federal property. Hence, even though NASA has been most cooperative in already providing space for blind vendors at the SSC [John C. Stennis Space Center], if an additional "feasible" "vending facility" is available, MVRB is entitled to a permit so that a blind vendor can operate it.

^{9/}Section 107(b) provides, in part:

Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified.

^{10/}Section 342.2 of the Postal Service Personnel Handbook EL-602 provides:

When space and potential patronage are adequate to support a vending facility, the only basis for disapproving a permit is if the vending operation would adversely affect the interests of the United States, as determined by the Secretary, Department of Education.

Commenting on the protest, the contracting officer reiterates the basis for his decision to deny the protest. He states:

Approximately four years ago, the Installation Head entered into permits with the Department of Rehabilitation Services to operate sixteen (16) sites within the Chicago Main Post Office, which was in compliance with [Section 107(b) of the Act]. The ruling is one or more sites and the Postal Service has more than fulfilled its obligation to the State Agency. [Emphasis in original].

The contracting officer further states that DORS was not contacted prior to issuance of the solicitation because the Postal Service had complied with the Act by previously granting "one or more" sites to DORS. The contracting officer notes, however, that DORS was included in the solicitation process and invited to attend the preproposal conference.

The protester submitted comments in response to the contracting officer's statement. DORS states that the award of the contract prior to the resolution of the protest was invalid.^{11/} DORS questions whether the contracting officer complied with Postal Contracting Manual (PCM) Section 2-407.8 g.(1)^{12/}. DORS argues that award of the contract was improper because the Postal Service would not have been seriously injured by delaying award of the contract since there is currently food service through vending machines and numerous restaurants are located in the vicinity of the Chicago Main Post Office.

DORS reasserts its claim that the award of sixteen sites to DORS four years earlier is not sufficient to comply with the Act. DORS concedes that the Act recognizes that there may be certain situations in which a priority should not be given to blind vendors. DORS argues, however, that the test for such a situation is whether the granting of the priority "would adversely affect the interests of the United States" not whether it is in the "best interest of the Postal Service" not to grant the priority.

Responding to the protester's concerns over the award of the contract, the contracting officer states that pursuant to PCM 2-407.8 g.(1), approval was requested from the Regional Postmaster General to proceed with award of the contract in order to ensure that approximately 8,000 employees assigned to the Main Post Office had access to quality food.^{13/} The

^{11/}Award of the contract was made to Ace Coffee Bar on December 7, 1990.

^{12/}Section 2-407.8 g.(1) provides in relevant part:

Where a protest has been filed with either the contracting officer or the General Counsel before contract award, award must not be made until the matter has been resolved, unless . . . the cognizant Regional Postmaster General . . . after consulting with assigned Postal Service counsel, determines that the Postal Service will be seriously injured, financially or otherwise, by delaying award until the protest has been resolved"

^{13/}Our review of the file indicates that the contracting officer obtained the appropriate determination from the Regional Postmaster General, allowing award of the contract while this protest was pending.

contracting officer explains that employees are given 30 minutes for lunch, which is an insufficient amount of time to go out to a restaurant, eat, and return to work on time. Further, the employees who work the night shift between 6:00 p.m. and 6:00 a.m. cannot dine in restaurants because they are closed.

The contracting officer states that the common practice in the Central Region is to combine manual cafeteria and vending food service in one solicitation package. This requirement, however, was separated several years ago. Since that time the Postal Service has not been able to retain contractors to operate the cafeteria. The two previous contractors lasted only seven months and eighteen months, respectively, because they could not make a profit operating the manual cafeteria without vending machine income. The contracting officer notes that although 28 contractors were identified as potential offerors prior to this solicitation being issued, only one contractor responded to the solicitation. The contracting officer states that it would injure the Postal Service if a viable food service program is not made available to its employees since previous cafeteria closings have resulted in labor problems and petitions from employees.

Discussion

The issue in this protest is whether DORS is entitled to a priority, under the Randolph-Sheppard Act, to operate the 16 sites at the Chicago Main Post Office. The contracting officer states that DORS does not have a priority since DORS had already been granted 16 permits four years earlier and the Act only requires the Postal Service to offer "one or more" of the vending facilities to the SLA.

The contracting officer's interpretation of the Act is incorrect. Section 395.30 of the regulations implementing the Act specifically states that each department or agency of the United States in control of Federal property "shall take all steps necessary to assure that, wherever feasible, in light of appropriate space and potential patronage, one or more vending facilities for operation by blind licensees shall be located on all Federal property" The words "one or more" on their face refer to the agency's obligation to establish at least one vending facility on its property, whenever vending facilities have not been introduced to a particular federal location and it is feasible to have them. These words are not a limitation on the number of facilities that may be operated by the SLA once these facilities have been established by the agency.^{14/}

The Department of Education's regulations are tracked by the applicable Postal Service regulations. Section 133 of Handbook AS-702 states that "[b]efore sending the Contracting Officer any requirement for a vending facility (other than cafeteria), the

^{14/}The contracting officer's position is foreclosed by the adverse arbitration decision in Illinois Dep't of Rehabilitation Services v. United States Postal Service, (1980) (Cox, Arb.) which concluded that the Postal Service had improperly denied DORS' permit requests for some of the vending machine locations at the Chicago Main Post Office and remanded the matter to the parties for negotiation as to which locations could be appropriately operated by the SLA.

regional employee relations division notifies the state agency. If the state agency wants a permit to operate the facility, all details are worked out between the division and the agency." Section 342.2 of Personnel Handbook EL-602 explains the circumstances under which the Postal Service can disapprove a permit. It states:

When space and potential patronage are adequate to support a vending facility, the only basis for disapproving a permit is if the vending operation would adversely affect the interests of the United States, as determined by the Secretary, Department of Education.

In this case, the contracting officer has not stated that the space or potential patronage were inadequate to support a vending facility, nor has he sought a determination from the Secretary

of DOE that the interests of the United States would be adversely affected if the vending operation was granted to the SLA.¹⁷

Since the contracting officer failed to comply with the applicable Postal Service regulatory provisions, we sustain the protest as to the 16 sites in the Main Post Office.¹⁷

We now turn to the relief available. It is clear that the procurement deficiency complained of here is quite serious, and that DORS was substantially prejudiced thereby. The contracting officer is directed to notify DORS about the requirement for the 16 vendor sites in the Main Post Office, and invite DORS to submit new application(s) for permit(s) to operate the vending machines at those sites. If DORS seeks those permits, then negotiations should take place between the Postal Service and DORS to work out the details.¹⁷ If agreement is reached, the existing contract with Ace Coffee Bar must be partially terminated for convenience as to the permitted sites. In order to ensure that Postal Service employees continue to have access to vended products while negotiations with DORS are taking place, Ace's contract may continue until an agreement is reached.

^{15/}It is conceivable that the problems identified by the contracting officer in the operation of the manual cafeteria without the vending machines, could be such an adverse affect, but that determination is for the Secretary to make. It also appears from the 1980 arbitration decision, see supra footnote 14, that it may not be feasible for blind operators to service some of the vending sites due to concerns about safety. The contracting officer, however, has not relied on any such safety concerns.

^{16/}Since we are sustaining the protest as to the 16 sites, and DORS has denied any interest in the remaining services sought in the solicitation, we need not address the alternative arguments presented by the protester.

^{17/}The contracting officer may, alternatively, seek exception of the sites from the Secretary of DOE as adverse to the interests of the United States and may omit any sites as to which operation by the blind is not feasible. Review of any determinations in that regard will be accomplished pursuant to the applicable Randolph-Sheppard regulations.

The protest is sustained to the extent indicated.

William J. Jones
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Office of Contracts and Property Law

[checked against original JLS 6/29/93]