



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Washington State Department of Services for the Blind

File: B-293698.2

Date: April 27, 2004

Shelly Marie Martin, Esq., and Andrew D. Freeman, Esq., Brown Goldstein Levy, for the protester.

Maj. Gregg A. Engler, Department of the Army, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest by state licensing agency (SLA) for the blind challenging the elimination of its proposal from consideration under request for proposals issued pursuant to the Randolph-Sheppard Act is dismissed; General Accounting Office will not consider protests from SLAs because arbitration procedures are provided for under the Act, and decisions of the arbitration panel are binding on the parties involved.

DECISION

The Washington State Department of Services for the Blind (WSDSB) protests the elimination of its proposal from consideration under request for proposals (RFP) No. W911S8-03-R-0001, issued by the Department of the Army for full food services at Fort Lewis, Washington.

We dismiss the protest.

The RFP here advised that this procurement would be conducted pursuant to the Randolph-Sheppard Act (the Act), which establishes a priority for blind persons recognized and represented by state licensing authorities (SLA) under the terms of the Act, in the award of contracts for, among other things, the operation of cafeterias in federal buildings. 20 U.S.C. § 107 (2000); 34 C.F.R. § 395.33(a) (2003). Thus, while the RFP generally provided for the solicitation to be set aside for small businesses, it indicated that the Washington State SLA would also be permitted to submit a proposal. Further, in accordance with the Act's implementing regulations, the RFP stated that, if the proposal submitted by the SLA were found to be within the competitive range for the acquisition, and is included among the proposals that have

a reasonable chance for award, the government would enter into negotiations only with the SLA. RFP at M-117; 34 C.F.R. § 395.33(b). WSDSB is the designated SLA for the procurement.

WSDSB submitted the only timely proposal in response to the solicitation. After an initial evaluation by the Army, WSDSB's proposal was "eliminated from further consideration." Army Letter to WSDSB, Feb. 5, 2004. According to the notice to WSDSB, the firm's proposed price was determined to be excessive when compared to current pricing and the independent government estimate.¹ After being debriefed, WSDSB filed this protest. WSDSB challenges the Army's determination that its price was excessive.

The Army seeks dismissal of the protest on the basis that the authority for resolving disputes between SLAs and contracting agencies has been placed with the Secretary of Education. 20 U.S.C. § 107d-1(b); 34 C.F.R. § 395.37(a). According to the Army, the Act anticipates that complaints by SLAs about an agency's handling of a procurement conducted pursuant to the Act will be addressed through arbitration.

In this regard, the Act vests authority for administering and overseeing its requirements solely with the Secretary. 20 U.S.C. § 107 et seq. Pursuant to this authority, the Secretary has promulgated comprehensive regulations addressing all aspects of the Act's requirements. Among the matters covered by these regulations are rules governing the relationship between SLAs and blind vendors in each state, rules for becoming a designated SLA within the meaning of the Act, procedures for oversight of the SLAs by the Secretary, and rules governing the relationship between the SLAs and all federal government agencies. 34 C.F.R. part 395. The Secretary's authority also includes conducting arbitration proceedings. In this regard, the Act provides, in relevant part, as follows:

Whenever any [SLA] determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of [the Act] or any regulations issued thereunder . . . such [SLA] may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute . . . and the decision of

¹ The Army's notice to WSDSB further indicated that the agency was "concerned that [WSDSB's] proposed teaming arrangement does not comply with federal and state laws and regulations." Army Letter to WSDSB, Feb. 5, 2004. However, the Army has since advised our Office that its concerns regarding WSDSB's teaming arrangement "would not have been a stand-alone reason to eliminate WSDSB and the Army's elimination rested upon [WSDSB's] excessive price." Army Comments, Mar. 17, 2004. (WSDSB had argued that there was no basis for the agency's expressed concern with the proposed teaming arrangement.)

such panel shall be final and binding on the parties except as otherwise provided in this chapter.

20 U.S.C. § 107d-1(b). The Act similarly provides that any blind licensee that is “dissatisfied with any action arising from the operation or administration of the vending facility program may submit to an SLA a request for a full evidentiary hearing”; in the event that the licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, the licensee “may file a complaint with the Secretary,” who shall convene a panel to arbitrate the dispute, and the decision of such panel shall be final and binding on the parties (except as otherwise provided). 20 U.S.C. § 107d-1(a).

We have interpreted the above provisions of the Act as vesting exclusive authority with the Secretary regarding complaints by SLAs concerning a federal agency’s compliance with the Act, including challenges to agency decisions to reject proposals in response to a solicitation. Mississippi State Dept. of Rehabilitation Servs., B-250783.8, Sept. 7, 1994, 94-2 CPD ¶ 99 at 3. Our view in this regard is consistent with the stated purpose of the arbitration process, as set forth in the preamble to the regulations issued to govern the arbitration process: “It is expected that when [an SLA] is dissatisfied with an action resulting from its submittal of a proposal for the operation of a cafeteria, it will exercise its option to file a complaint with the Secretary” 42 Fed. Reg 15,802, 15,809 (1977).² Our position also reflects our more general view that where, as here, Congress has vested oversight and final decision-making authority in a particular federal official or entity, we will not consider protests involving issues subject to review by that official or entity. Id.; see High Point Sec., Inc.–Recon. and Protest, B-255747.2, B-255747.3, Feb. 22, 1994, 94-1 CPD ¶ 169 at 2 (determinations by the Small Business Administration under the certificate of competency program pursuant to 15 U.S.C. § 637(b)(7)); ARA Envtl. Servs., Inc., B-254321, Aug. 23, 1993, 93-2 CPD ¶ 113 at 2 (protest of award under the Javits-Wagner-O’Day Act, 41 U.S.C. §§ 46-48c).

WSDSB questions our position, arguing that resort to arbitration under the Act is voluntary, and that the availability of arbitration does not preclude an SLA from instead pursuing other remedies, such as a bid protest filed with our Office. We find WSDSB’s argument unpersuasive. Aside from our rationale discussed above, we note that the predominant view of the courts that have considered the issue has been consistent with ours. Specifically, the view of most courts appears to be that the Act manifests Congress’s intent that aggrieved SLAs or vendors generally pursue and exhaust their administrative and arbitration remedies through the Department of

² The regulations governing the arbitration process were under Title 45 of the Code of Federal Regulations, 45 C.F.R. § 1369.37, but are now under Title 34, 34 C.F.R. § 395.37.

Education arbitration process before resorting to the federal courts. Committee of Blind Vendors v. District of Columbia, 28 F.3d 130, 133-35 (D.C. Cir. 1994); Randolph-Sheppard Vendors of Am. v. Weinberger, 795 F.2d 90, 102-04 (D.C. Cir. 1986); Fillinger v. Cleveland Soc’y for the Blind, 587 F.2d 336, 338 (6th Cir. 1978); Alabama Dept. of Rehabilitation Servs. v. United States Dept. of Veterans Affairs, 165 F. Supp. 2d 1262, 1269-71 (M.D. Ala. 2001); State of New York v. United States Postal Serv., 690 F. Supp. 1346, 1349-51 (S.D. N.Y. 1988); Massachusetts Elected Committee of Blind Vendors v. Matava, 482 F. Supp. 1186, 1189 (D. Mass. 1980); but cf. Texas State Commission for the Blind v. United States, 6 Cl. Ct. 730, 735 n.12 (1984) (arbitration under the Act is “voluntary”), rev’d on other grounds, 796 F.2d 400, 404 n.4 (Fed. Cir. 1986) (noting that Oklahoma had filed an arbitration complaint more than a year earlier without yet receiving a decision, and stating that the “district court did not require exhaustion of administrative remedies because of the delay and the government’s interposing of no objection”), cert. denied, 479 U.S. 1030 (1987); Washington State Dept. of Servs. for the Blind v. United States, 58 Fed. Cl. 781, 786 n.8 (Fed. Cl. 2003) (court states that it has jurisdiction under Texas State Commission for the Blind v. United States, 796 F.2d 400, 404 (Fed. Cir. 1986)).³ The courts’ predominant view appears consistent with congressional intent, as reflected in the legislative history of the 1974 amendments to the Act, which established the arbitration procedure. Specifically, a Senate report on the bill declared that “[i]t is the expectation of the Committee [reviewing the amendments] that the arbitration and review procedures adopted . . . will provide the means by which aggrieved vendors and State agencies may obtain a final and satisfactory resolution of disputes.” S. Rep. No. 937, 93d Cong., 2d Sess. 20 (1974).

WSDSB maintains that our Office should consider its protest because it concerns an issue—the propriety of the agency’s price reasonableness determination—that does not fall under the Act. However, since the issue raised ultimately goes to the question of whether the SLA should have been included in the competitive range, we view the issue as whether the agency’s actions improperly denied the SLA the priority required under the statutes and regulations; this issue clearly comes within the scope of the arbitration process.⁴ WSDSB also generally argues that it should not

³ We note that while the courts have recognized that there may be circumstances in which it is appropriate to excuse a failure to exhaust the administrative remedies on the basis of a specific, particularized showing of futility, such as where an adverse result is certain and administrative remedies are clearly useless, see Committee of Blind Vendors v. District of Columbia, 28 F.3d at 133 n.5, again, the majority of courts have held that generally there must be an exhaustion of the administrative remedies under the Act.

⁴ In this regard, our conclusion that the question of whether an SLA should have been included in the competitive range comes within the scope of the arbitration process finds support in the actions of the Department of Education, which has established Randolph-Sheppard arbitration panels to consider challenges to an SLA’s exclusion
(continued...)

be required to use the arbitration procedure because the remedy under the procedure is inadequate in that the arbitration panel does not have authority to stay the award of a new contract. However, the fact that the protester views the remedies under the Act as inadequate does not warrant our ignoring Congress's stated intent, the predominant view of the courts, and the rationale on which our own view is based. Accordingly, we will not consider the protest.

The protest is dismissed.

Anthony H. Gamboa
General Counsel

(...continued)

from the competitive range. Alabama Dept. of Rehabilitation Servs. v. United States Department of Defense, Randolph-Sheppard Arbitration Panel Decision, Nov. 16, 1998, 65 Fed. Reg. 26,591 (2000); see Mississippi Dept. of Rehabilitation Servs. v. United States Department of Defense, Department of the Air Force, Randolph-Sheppard Arbitration Panel Decision, June 11, 1996, 62 Fed. Reg. 40,509 (1997).