

required to invite the SLA to bid on the contract. If the SLA's proposal falls within the competitive range and has been ranked among those with a reasonable chance of being selected, a Federal agency must give priority to the SLA's proposal.

GSA acknowledged that a competitive range was not established and that it awarded the contract based on its determination that the private company's proposal merited a direct award, but the failure to create a competitive range constituted a violation of the Act. (*Southfork Sys. v. United States*, 141 F. 3d 1124 (Fed. Cir. 1998); *Kentucky v. United States*, 2014 WL 7375566 (W.D. Ky. Dec.29, 2014).

Having found that GSA violated the Act, the Panel next considered the issue of remedy. The Panel recognized that, while it had no authority to impose a specific remedy, the Act requires the head of the agency, subject to appeal, to take such action as may be necessary to carry out the Panel's decision.

The Panel recommended that GSA give (1) notice of the Panel's decision to the current contractor and (2) notice that the contract would terminate within a specified period. The Panel also recommended that GSA enter into direct negotiations with the SLA. If the GSA declined to enter into such negotiations, the Panel recommended that GSA issue a new solicitation, with a competitive range.

The views and opinions expressed by the Panel do not necessarily represent the views and opinions of the Department.

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Dated: April 11, 2017.

**Ruth E. Ryder,**

*Deputy Director, Office of Special Education Programs, delegated the duties of the Assistant Secretary for Special Education and Rehabilitative Services.*

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## DEPARTMENT OF EDUCATION

### Arbitration Panel Decision Under the Randolph-Sheppard Act

**AGENCY:** Department of Education.

**ACTION:** Notice of arbitration decision.

**SUMMARY:** The Department of Education (Department) gives notice that, on March 17, 2011, an arbitration panel (the Panel) rendered a decision in *Bernard Werwie, Jr. v. Pennsylvania Office of Vocational Rehabilitation* (Case no. R-S/07-16).

**FOR FURTHER INFORMATION CONTACT:** You may obtain a copy of the full text of the Panel decision from Donald Brinson, U.S. Department of Education, 400 Maryland Avenue SW., Room 5045, Potomac Center Plaza, Washington, DC 20202-2800. Telephone: (202) 245-7310. If you use a telecommunications device for the deaf or a text telephone, call the Federal Relay Service, toll-free, at 1-800-877-8339.

Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:** The Panel was convened by the Department under the Randolph-Sheppard Act (Act), 20 U.S.C. 107d-1(a), after receiving a complaint from the complainant, Bernard Werwie, Jr., a licensed blind operator of a vending facility in Luzerne County, Pennsylvania. Under section 107d-2(c) of the Act, the Secretary publishes in the **Federal Register** a synopsis of each Panel decision affecting the administration of vending facilities on Federal and other property.

### Background

The complainant, Bernard Werwie, Jr., was a licensed blind operator of a vending facility in Luzerne County, Pennsylvania. His dispute with the respondent, the Commonwealth of Pennsylvania's Office of Vocational Rehabilitation (PA OVR), arose out of the termination of his participation in the Business Enterprises Program by the PA OVR effective December 31, 2006.

Pursuant to the Act, Mr. Werwie sought a hearing of his claims against

the PA OVR. On July 7, 2008, a hearing officer dismissed his appeal and denied his request for damages and attorney's fees. The PA OVR adopted the hearing officer's decision as its final agency action.

Mr. Werwie then requested the convening of the Panel. The Panel chair moved to schedule a hearing for that summer. There were no acceptable hearing dates available in the summer, so the Panel chair circulated a list of proposed dates in late 2009.

The hearing was not held in 2009 because, in July, Mr. Werwie discharged the attorneys he had engaged to handle the case. The Panel granted him until January 2010 to find new counsel.

Despite being granted an extension to name a new representative by January of 2010, Mr. Werwie did not respond until February 25. In his response, he indicated that he was still looking for new counsel and asked that the case be held in abeyance until September 2010 or until further notice. The PA OVR objected to this request for delay, and, on March 29, 2010, the Panel gave Mr. Werwie until May 3, 2010, to find new counsel.

Mr. Werwie never responded with the name of a new representative as requested by that deadline. Accordingly, the Panel chair informed him that, if he intended to proceed with his case against the PA OVR, he had to respond by June 10, 2010.

On July 1, 2010, the PA OVR filed a motion to dismiss Mr. Werwie's claims for failure to prosecute. Counsel for the PA OVR served Mr. Werwie a copy of this motion and supporting brief by sending them by First Class Mail to his Fredericksburg, Virginia, address.

On July 18, 2010, the RSA informed the Panel chair of an email received from Mr. Werwie asking about the status of his case. In it, he alleged that he had heard nothing about the case since early March. This message was from email and postal mail addresses different from those he had used in his prior correspondence. The New Cumberland, Pennsylvania, address that he listed in his July 18 communication was identified as his father's address.

The Panel responded to Mr. Werwie on August 9, 2010. It asked him for confirmation that he was ready to proceed with the case and instructed him to inform it of the name and contact information of his new counsel on or before August 29, 2010. The Panel indicated that, if it could not schedule a hearing, it would then proceed with the PA OVR's motion to dismiss the complaint.

On August 18, Mr. Werwie notified the Panel that his representatives were

the same attorneys whom he fired on July 22, 2009. The Panel then asked the attorneys to confirm that they represented Mr. Werwie and proposed a conference call to be held on September 2, 2010.

On August 30, one of the attorneys, Mr. Leiterman, responded by email that Mr. Werwie asked him and his colleague to represent him in this case. Mr. Leiterman continued that they had "agreed in principle," and they expected the letter of representation to be signed in the next week. However, in the two weeks that followed, the Panel did not hear from either attorney.

On September 17, 2010, the Panel sent Mr. Werwie a letter indicating that it would grant the PA OVR's motion to dismiss if Mr. Werwie did not respond by November 1, 2010. Neither Mr. Werwie nor his attorneys responded to the motion to dismiss. On March 17, 2011, the Panel granted the PA OVR's motion to dismiss for failure to prosecute.

#### Synopsis of the Panel Decision

The Panel reviewed the statutory language of the Act and the RSA's implementing regulations, policies, and procedures. The Panel concluded that it has the authority to grant a motion to dismiss in this case without first conducting a hearing. It also concluded that there were unusual circumstances present in this case, notably delays in the process due to the change of Mr. Werwie's lawyers. The Panel repeatedly warned Mr. Werwie that his failure to move the case forward could result in dismissal and noted that he chose not to file a response at all although he was given ample time to do so. Because of these circumstances, the Panel decided that granting the PA OVR's motion to dismiss for Mr. Werwie's failure to prosecute was an appropriate exercise of its discretion.

The views and opinions expressed by the Panel do not necessarily represent the views and opinions of the Department.

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Dated: April 11, 2017.

**Ruth E. Ryder,**

*Deputy Director, Office of Special Education Programs, delegated the duties of the Assistant Secretary for Special Education and Rehabilitative Services.*

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## DEPARTMENT OF EDUCATION

### Arbitration Panel Decision Under the Randolph-Sheppard Act

**AGENCY:** Department of Education.

**ACTION:** Notice of arbitration decision.

**SUMMARY:** The Department of Education (Department) gives notice that, on May 30, 2012, an arbitration panel (the Panel) rendered a decision in the matter of the *Colorado Department of Human Services, Division of Vocational Rehabilitation, Business Enterprise Program v. the United States Department of Defense, Department of the Air Force* (Case no. R-S/10-06).

**FOR FURTHER INFORMATION CONTACT:** You may obtain a copy of the full text of the Panel decision from Donald Brinson, U.S. Department of Education, 400 Maryland Avenue SW., Room 5028, Potomac Center Plaza, Washington, DC 20202-2800. Telephone: (202) 245-7310. If you use a telecommunications device for the deaf or a text telephone, call the Federal Relay Service, toll-free, at 1-800-877-8339.

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**SUPPLEMENTARY INFORMATION:** The Panel was convened by the Department under the Randolph-Sheppard Act (Act), 20 U.S.C. 107d-1(b), after receiving a complaint from the Colorado Department of Human Services, Division of Vocational Rehabilitation, Business Enterprise Program. Under section 107d-2(c) of the Act, the Secretary publishes in the **Federal Register** a synopsis of each Panel decision affecting the administration of vending facilities on Federal and other property.

## Background

This is an arbitration between the Colorado Department of Human Services and the United States Department of Defense, Department of the Air Force, pursuant to the Act.

From October 1, 2006 through March 31, 2011, Don Hudson, a blind vendor licensed by the complainant, the Colorado Department of Human Services (CO DHS), Division of Vocational Rehabilitation, Business Enterprise Program, operated the High Country Inn, a food service operation located at the United States Air Force Academy near Colorado Springs, Colorado. In 2010, the respondent, the United States Department of Defense, Department of the Air Force (Air Force), published a competitive bidding announcement for the operation of the High Country Inn. The Air Force included in its solicitation for this contract a requirement that only those offerors whose price was within 5 percent of the lowest offeror's price would be considered for award of the contract.

The CO DHS's bid was in excess of this 5 percent competitive range and, accordingly, the CO DHS was eliminated from competition for the contract. The contract was awarded to the lowest bidder.

The CO DHS filed a complaint with the United States Secretary of Education pursuant to the Act and its regulations. The CO DHS claimed that the 5 percent competitive range was set at such a low figure that it eliminated the priority to be afforded to blind vendors under the Act and its regulations. It also asserted that the Air Force misled it into thinking it had the lowest bid and, therefore, the CO DHS did not reduce its price when it had the opportunity to revise its bid in response to an amendment to the solicitation. In addition, it claimed that the Air Force should have conducted direct negotiations with the blind vendor rather than using a competitive process.

The CO DHS also claimed that the Air Force violated 34 CFR 395.20(b) because the 5 percent competitive range was a limitation that the Air Force did not justify in writing to the Secretary of Education. Finally, the CO DHS asserted that the 5 percent competitive range was unlawful because it was based on the August 29, 2006, Joint Report to Congress, which required the setting of this competitive range but had not yet been implemented.

### Synopsis of the Panel Decision

The Panel held, with one member dissenting, that the CO DHS had waived