Issues for OIRA Consideration Regarding the Rule Supporting Competition in the U.S. AbilityOne Program
RIN: 3037-AA14

Principles for Final Rulemaking

The U.S. Ability One Commission (Commission) is required to comply with several laws, regulations, and executive orders when promulgating new rules for the AbilityOne Program. The process, justification, and Notice of Proposed Rulemaking (NPRM) issued by the Commission failed in several instances to follow the requirements of: (1) E.O. 12866 Regulatory and Planning Review; (2) OMB Circular A-4; and (3) The Regulatory Flexibility Act. Therefore, we recommend that the proposed rule be withdrawn and issued as an Advanced Notice of Proposed Rulemaking. AEAW is concerned that the proposed rule failed to follow the principles and requirements from E.O. 12866:

- E.O. 12866 Section 1(a) that agencies should only promulgate regulations "required by law, necessary to interpret the law or made necessary by compelling public need."
- E.O. 12866 Section 1(a) that agencies should assess all costs and benefits "to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider."
- E.O. 12866 1(a) that "in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach."
- E.O. 12866 Section 1(b)(11) that agencies "shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations."
- E.O. 12866 Section 1(b)(12) that agencies "shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty."

Importantly, the U.S. AbilityOne Commission did not conduct a proper cost-benefit analysis and or a Regulatory Flexibility Act analysis. The cost-benefit analysis provided in the NPRM was incomplete and primarily based upon a misinterpretation of the quantitative information available. Some of the areas where the cost-benefit analysis fell short of executive orders and regulations guiding the development of cost-benefit analysis include:

- E.O. 12866 and OMB Circular A-4 that agencies shall assess alternative regulatory approaches, which is understood to include the option of not regulating.
- OMB Circular A-4 7(c) which states that "If a regulation involves a market where the price does not reflect the value to society, you should try to identify and estimate the additional benefits

and costs external to the market that result from changes in the quantity of goods and services in the market in your analysis."

- OMB Circular A-4 6(e) that agencies should consider and assess different requirements for different-sized entities because small entities "may find it more costly to comply with regulations, especially if there are large fixed costs required for compliance."

Failure to Comply with E.O. 12866 Regulatory and Planning Review

Promulgation of a rule supporting price competition in the AbilityOne Program is not required by law and it is questionable whether the Commission has the authority under the Javits-Wagner-O'Day Act to introduce price competition. Further, the NPRM rests on a questionable interpretation of the Javits-Wagner-O'Day Act regarding the intent of the Program and the process of determining the fair market price of goods and services.

Congress's original intent in creating the Committee for Purchase from People Who are Blind was to create a closed system, outside of the normal competitive procurement procedures to price-fix products to protect people who are blind. During House floor debate in 1938, Representative James Patrick McGranery (D-Penn.) explained, "*if the blind are going to get a fair price for their products*" they should "*have in charge of the distribution of their products someone knows business methods*," assuring his colleagues that creating a Committee for the blind would not create "a monopoly" or a "price-fixing body" and instead would create a "*price-fixing body for the protection of the blind themselves*".[1] Representative James J. Lanzetta (D-N.Y.) further explained that the purpose for developing this program outside of competition was that, at the time, competition among organizations employing blind individuals had led to "*the prices which they quote in seeking this work are so low as to be practically ruinous*."[2]

Additionally, the Commission relied heavily on a misinterpretation of court rulings regarding price competition pilot programs as legal justification for the proposed regulatory changes. Federal courts have increasingly ruled that regulatory novelty is not allowable by citing the lack of regulatory history or antecedents by federal regulatory agencies.

The NPRM claims that regulatory changes are necessary to make Fair Market Price determinations because of the findings from the 898 Panel that recommended adding price competition on a limited basis into the Program. The 898 Panel believed price competition would solve a problem of the infeasibility of bilateral negotiations to determine the fair market price.

DoD conducted a comprehensive program performance audit of the AbilityOne Program published in June 2016. The review indicated that DoD generally provided effective oversight in a sampling of 39 AbilityOne contracts valued at almost $595 million out of 203 contracts valued at $2.3 Billion. They concluded that the program for supplies and services operated as intended under effective internal procedures. Further, DoD determined that fair and reasonable prices, especially for supply contracts, were arrived at through price analysis, market research, and reliance on original price analysis when prices remained steady or compared proposed prices to previous contract prices for commercial prices

[1] Congressional Record – House, Library of Congress E Resources, Legislative Insight, 6/13/1938, p. 9112
[2] Congressional Record – House, Library of Congress E Resources, Legislative Insight, 6/13/1938, p. 9113

or for similar items. DoD did not suggest there was a need for AbilityOne price competition for either products or services in order to arrive at the DoD FMPs. ("DoD Generally Provided Effective Oversight of AbilityOne Contracts", DODIG-2016-097, Inspector General, Department of Defense, June 17, 2016).

The NPRM also failed accurately to evaluate or take into account the burdens and costs that fall on different entities as a result of adding price competition and recompetition into the Program:

- Individuals with significant disabilities
- Small NPAs
- Community programming within NPAs
- The Commission and the CNAs
- The cumulative impact of the costs of this rule together with upcoming rulemaking and sub-regulatory compliance requirements policies

The NPRM also did not consider the costs and benefits of strengthening guidance and processes under existing regulations (i.e., the alternative of not regulating) to meet the "compelling interest" of modernizing the Program and better aligning with the needs of the Federal customer.

Current statutory, regulatory, and sub-regulatory guidance provide the following vehicles for ensuring the provision of quality goods and services to the Federal Customer:

- Set the quality measures and requirements in the contractual vehicle with appropriate deductions for not meeting them
- Through the CNAs, NPAs can be placed on Performance Improvement Plans and/or Corrective Action Plans
- For DoD customers, issue CPARS to document non-performance
- Contractually reduce the scope and price

There are also myriad methods in place to ensure reasonable price without the need for adding price competition and recompetition into the Program. Some of those methods include:

- Independent Government estimates
- Full and open bilateral negotiation and review of all of the components and sub-components of the NPA's proposed price
- Price and costing requirements in 41 U.S.C. 8501-8506; Code of Federal Regulations Subtitle B, Chapter 51 of Title 41; FAR Subpart 8.7; FAR Subpart 31.7; and guidance promulgated thereunder

We urge further analysis of the use of these existing alternative methods and reasons why the current, already extensive, regulations are not meeting the needs of the Federal customer before inserting competition/price competition into a Program that was purposefully created to be "other than competitive" in order to meet the compelling interests of the Federal government.

Finally, with regard to E.O. 12866 requirements, the rule fails to meet the standard of being "simple and easy to understand with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty." As drafted in the NPRM, the rule is subject to being arbitrarily and capriciously applied. The NPRM lacked any specific criteria by which the Commission would consider or approve a competitive reallocation.

Without significant changes that address how the Commission will determine which contracts will be approved for competition and providing a specific formula for how contracts will be judged during the competition process, the Commission and the Program open themselves up to litigation every time a contract is approved for recompetition. There should be a clear and explicit standard for what would gain approval to commence a recompetition, what circumstances (such as poor performance) necessitate competition as an option, and there should be a requirement that bilateral negotiations be given a chance to arrive at a reasonable price and mediate any misunderstandings between the customer and the incumbent NPA before imposing the additional regulatory burdens in the NPRM. Absent such criterion, the Commission opens itself up to claims of arbitrarily approving competitive reallocation requests and the possibility of litigation for each contract approved for recompetition.

Including price as a primary factor in competition dramatically alters how contracts are currently allocated in the Program. Without including clearly defined and heavily weighted social impact factors relating to the employment potential for people with the most significant disabilities, to ensure the true "best value" of the contract, the inevitable result is a shift toward (1) prioritizing contract price over increasing jobs for individuals with the most significant disabilities, (2) prioritizing contract price over increasing job supports and career growth for individuals with the most significant disabilities, (3) prioritizing contract price over increasing the return on investment for American taxpayers by reducing reliance on social benefits and increasing tax revenue paid by individuals with the most significant disabilities, and (4) focusing on lowest price technically acceptable proposals which undermines the employment mission of the Program and again opens the Commission up to the possibility of litigation for each contract approved for recompetition.

Failure to Comply with OMB Circular A-4

The cost analysis in the Proposed Rule insufficiently analyzed and estimated the costs of introducing competition into the AbilityOne Program leading to an NPRM based on flawed assumptions and one that may exacerbate the problems that it purports to solve. The NPRM cost analysis does not consider the full scale of potential spend across the NPA network in the event of a competition.

The cost benefits to the federal customer purported by the NPRM to be demonstrated by the pilot competitions were actually overwhelmingly based on a reduction in scope of the contracts in the competition pilots and not actually a result of competition.

The current cost analysis in the Proposed Rule does not include the potential cost increases to the participating non-profits and the central nonprofit agencies, which may lead to artificially increased general and administrative expenses to the program.

Not only did the AbilityOne Commission neglect to provide an adequate quantitative cost-benefit analysis of the NPRM on NPAs within the Program, but it neglected to provide a qualitative measure of costs and benefits by considering the impact on the current workforce. The rule does not properly consider the risks to employees if NPAs are compelled to reduce workforce costs and/or vocational support costs in order to reduce bid costs and stay solvent.

The cost-benefit analysis in the NPRM did not consider:

- The cost of potential displacement of workers because of re-competitions
- The undermining of Congressional intent and mission of the Program to increase job opportunities for disabled Americans with significant barriers to employment.

The relationships with employees and non-profit staff within the AbilityOne Program that will be disrupted because of recompetition of contracts are not equivalent to the relationship between employees of other federal contractors. To assume that employees with significant barriers to employment could easily switch between non-profits should a contract change hands represents a gross misunderstanding of the relationship between NPAs and employees and how NPAs facilitate successful employment outcomes for people with disabilities in the Program.

If employees with disabilities lose their jobs because of price competition, this will result in additional costs to the federal government, not captured in the NPRM's cost-benefit analysis, because individuals may initiate or return to government benefits which were unnecessary because of their AbilityOne contract job and will no longer generate tax revenue.

The price of AbilityOne contracts for Federal agencies does not reflect the true value of this Program to society. This rulemaking will impact this value proposition.

Failure to Conduct a Regulatory Flexibility Act Analysis

In the NPRM the Commission stated: "The Committee does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, at 5 U.C.S. 601, et seq., because it does not include any new reporting, recordkeeping or other compliance requirements for small entities." A Federal agency must prepare and submit a public regulatory flexibility analysis unless "the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."

The Congressional Findings section of the RFA found that, among other things:

> "(4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;
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> (5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;

(6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;

(7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions."

Allowing re-competition of contracts already on the procurement list would be a "new compliance requirement" for NPAs, many of which are small organizations. As stated in the sections above on compliance with E.O. 12866 and OMB Circular A-4, the Commission failed in the NPRM to conduct a thorough and accurate cost-benefit analysis and failed to consider the impacts that the rule will have on different entities and individuals. As such, it is even more glaring that the Commission neglected to conduct an RFA to consider the impact of the rule on small NPAs, whether there are regulatory alternatives that would minimize such an impact, how the rule could create barriers to entry within the Program and lead to consolidation of NPAs, and whether the rule is inconsistent with promotion of economic welfare of disadvantaged population that is at the center of the AbilityOne Program.

The NPRM significantly deviated from the 898 Panel's recommendation to limit recompetition to contracts $10 million in annual value or above and, therefore, more small NPAs are subject to recompetition. However, because the Commission did not conduct an RFA analysis, there is no way to know how this rule impacts small organizations (which includes small non-profit organizations) or whether the rule was designed to minimize the adverse impacts on small organizations. This rule, especially with the deviation from the 898 Panel recommendation lowering the threshold for price competition and recompetition, potentially subjects contracts held by small NPAs to price re-competition and is a new requirement that should have triggered an RFA analysis.

Recommendation

OIRA should send the final draft rule back to the AbilityOne Commission because of questions around whether the rule is required by law or necessary to interpret the law, lack of a thorough and complete cost-benefit analysis, absence of an analysis of regulatory alternatives to rulemaking and the lack of a Regulatory Flexibility Act analysis.

The Alliance for Expanding America's Workforce (AEAW) is a non-profit social welfare organization dedicated to increasing employment opportunities for people with disabilities by modernizing the federal government's procurement process, direct hiring practices, and policies.