

MEMORANDUM OF AGREEMENT
BETWEEN
THE UNITED STATES ARMY'S PROGRAM EXECUTIVE OFFICE SOLDIER ("PEO
SOLDIER")
THE U.S. ABILITY ONE COMMISSION ("COMMISSION")
AND
THE DEFENSE LOGISTICS AGENCY – TROOP SUPPORT ("DLA-TS")
FOR
COORDINATION OF FEDERAL PROCUREMENT LIST ITEMS
AGREEMENT NUMBER SSV-20230815

This is a memorandum of agreement (MOA) between PEO Soldier, the Commission, and DLA-TS. When referred to collectively, PEO Soldier, the Commission, and DLA-TS are referred to as the "Parties."

1. BACKGROUND:

1.1. Under the Javits-Wagner-O'Day (JWOD) Act (41 U.S.C. §§ 8501-8506), the Commission is required to maintain a list of products and services it determines are suitable for the Federal Government to procure from nonprofit agencies employing people who are blind or who have significant disabilities, known as the Procurement List (PL). (41 U.S.C. 8503.) The Commission is authorized to make changes to the PL by adding or deleting items. (41 U.S.C. 8503(a)(2).) The JWOD Act also authorizes the Commission to prescribe regulations regarding the specification for products for the PL, the time of their deliveries, or other matters as necessary to carry out the statutory mandate. (41 U.S.C. 8503(d)(1).) The Federal Government is required to procure items on the PL in accordance with Commission regulations. (41 U.S.C. 8504.)

1.2. Consistent with its statutory authority, the Commission promulgated regulations governing the establishment of the PL and the contracting requirements for purchasing items from the PL. Both 41 C.F.R. 51-2.8(b) and 51-5.3(a) indicate that the Commission may place a limitation on the portion of the product that is added to the PL that must then be procured from the source designated by the Commission. As noted in 41 C.F.R. 51-5.3(a), where geographic areas, quantities, percentages, or specific supply locations for a commodity are listed, the mandatory provisions of the JWOD Act apply only to the portion or portions of the product on the PL.

1.3. With that framework in mind, and in an effort to streamline its development timelines, PEO Soldier worked with the Commission-designated Central Nonprofit Agencies (CNAs), SourceAmerica and National Industries for the Blind (NIB), to add a prototyping service requirement to the PL, known as the Manufacturing and Development (M&D) contract, that enables AbilityOne-participating nonprofit agencies (NPAs) to work with PEO Soldier and other federal agencies in developing next generation and new items to outfit and protect the warfighter.

1.4. Since its inception, the M&D contract provides federal agencies with flexibility in being able to quickly contract with appropriate AbilityOne NPAs and to work closely with those contractors to develop the end item. To utilize the M&D contract, PEO Soldier develops a statement of work (SOW) for the item it is looking to update or initially establish and provides it to SourceAmerica, who serves as the prime contractor for its associated NPAs and those NPAs associated with NIB (with NIB assistance). The appropriate CNA in turn works with its network NPAs to determine which one(s) have the technical capabilities and available resources to update/develop the item covered under the SOW. Some M&D efforts lead to new/updated PL items, while other efforts never reach the suitability goals and are not added to the PL.

1.5. Previously, upon successful completion of an M&D effort, PEO Soldier initiated a separate PL addition as a "C-List" item, which, at the time, meant that the mandatory purchase requirement extended to PEO Soldier's requirement executed through contracts with Army Contracting Command, Aberdeen Proving Ground, Natick Division. Put more succinctly, when the Commission conducted a suitability determination in accordance with 41 C.F.R. § 51-2.4, the capability of a prospective NPA as the mandatory source of supply was limited to PEO Soldier's requirement. Meaning, other Federal agencies, or sub-agencies within a Department could purchase a C-List product under certain circumstances, but they were not required to purchase the product in accordance with 41 U.S.C. § 8504(a). DLA-TS routinely relied on this flexibility to divide larger quantity procurements, to support not only the AbilityOne Program, but other socio-economic goals and the commercial domestic industrial base. However, the Commission's authority to use the C-List as a "scoping mechanism" was not recognized by the Court of Federal Claims (COFC) in *Goodwill Industries of South Florida v. U.S.*, 160 Fed. Cl. 162, 203-207 (Fed. Cl. 2022).

1.6. Although COFC's *Goodwill* decision largely precluded the Commission from placing items on the PL for use by specific Federal agencies, COFC's decision in *SEKRI, Inc. v. U.S.*, 165 Fed. Cl. 21, affirmed the Commission's authority to place scope limitations for products added to the PL IAW 41 CFR 51-2.4, 2.5, and 5.3. *SEKRI, Inc. v. U.S.*, 165 Fed. Cl. 21, 38-40 (Fed. Cl. 2023). The practical effect of this decision is to make the Commission's decision to place products on the PL binding on all Federal agencies. As a result of the *SEKRI* decision, the legacy C-list arrangement the Parties had traditionally relied on was no longer a viable method for managing the so-called M&D to sustainment pipeline.

1.7. In response to the *SEKRI* decision, the Commission Chairperson issued a procedural change to how these products would be added to the PL and an interim policy to resolve disputes related to scoping limitations on existing PL items. This solution was put in place as a stop-gap measure to ensure the Program's processes were fair, predictable, and consistently applied until a long-term fix could be established.

2. AUTHORITIES:

- 2.1. The JWOD Act, (41 U.S.C. §§ 8503).
- 2.2. The Commission regulation (41 C.F.R. Chapter 51)(Committee for Purchase from People Who Are Blind or Severely Disabled).
- 2.3. The Federal Acquisition Regulation (FAR) Subpart 8.7 (Acquisition from Nonprofit Agencies).
- 2.4. DoD Instruction 4000.19 Support Agreements dated 16 December 2020.
- 2.5. DLA Instruction 4000.19, Support Agreements dated 1 March 2022.

3. **PURPOSE AND SCOPE:** To clarify the principles, rules, and procedures the Commission will utilize when making PL determinations with respect to the development, initial fielding, and sustainment of requirements described at Paragraph 4 of this agreement to ensure that all Parties acquire supplies and services in accordance with the JWOD Act.

4. RESPONSIBILITIES OF THE PARTIES:

4.1. Manufacturing and Development (M&D) Contract: This MOA is meant to encourage early coordination of M&D requirements to ensure that all Parties are fully aware when successful products transition from M&D to the PL. Many of the PEO Soldier M&D requirements are to either modify or retrofit a current PL item, to determine suitability of a replacement PL item, or to determine suitability of a new product or program. As such, the Parties agree as follows for PEO Soldier items:

- 4.1.1. PEO Soldier will be responsible for:
 - 4.1.1.1. Developing requirements for the work to be performed.
 - 4.1.1.2. Submitting the requirements to the CNA to determine if there are any qualified NPAs capable of performing all or a part of the work.
 - 4.1.1.3. Working with the CNA and NPA to issue the task order under the existing PL service requirement, strictly limited to M&D.
 - 4.1.1.4. Submitting orders and contracts for the M&D work to the CNA/NPA.
 - 4.1.1.5. Notifying the CNA and the Commission once M&D task order is complete.
 - 4.1.1.6. For items that will be added to the PL, or replace existing items on the PL, coordinating with DLA-TS regarding the M&D work and future acquisition strategy and projected requirements, including potential impact on the domestic industrial base.
 - 4.1.1.7. Sending a request to the CNA to initiate a PL addition for fielding if continued production is needed. If continued production is not needed, the Army must inform the CNA and Commission that the prior service will be discontinued.

4.1.2. The Commission will be responsible for:

- 4.1.2.1. Providing guidance and appropriate oversight to the CNA(s), who review the capability request to determine whether the M&D contract is a suitable vehicle for the PEO Soldier to use to meet a portion or all of its prototyping requirements.
- 4.1.2.2. Authorizing the CNA(s) to serve as the M&D prime contractor, responsible for negotiating pricing and the delivery schedule, and subsequently accepting and allocating task orders, if capability and feasibility are determined.
- 4.1.2.3. Ensuring the CNA(s) fulfill other M&D contract responsibilities, such as contract administration and issue resolution.

4.1.3. DLA-TS will be responsible for:

- 4.2.3.1. Coordinating with PEO Soldier regarding the M&D work, including providing data regarding the status of, and impact to, the domestic industrial base related to the item proposed to be added to the PL.

4.2. Initial or Rapid Fielding: For those items from the M&D program which PEO Soldier determines warrant initial or rapid fielding (meaning fielding prior to transition to DLA-TS for sustainment), the Parties agree as follows:

4.2.1. PEO Soldier will be responsible for:

- 4.2.1.1. Developing the initial fielding requirements.
- 4.2.1.2. Coordinating with the CNA to identify whether there are NPA(s) that can meet the requirements.
- 4.2.1.3. If the proposed addition will eventually move on to DLA-TS for sustainment, developing the future fielding requirements and coordinating with DLA-TS and CNA regarding the placement and potential scoping of requirements IAW 41 CFR 51-2.4, 2.5, and 5.3 on the PL if applicable. Once added, the product producing NPA(s) become the mandatory source(s) for the life cycle of the requirement at the quantity or percentage established by the Commission at the time of addition.
- 4.2.1.4. If there is no plan to move the proposed addition to DLA-TS for sustainment, no coordination is needed. However, PEO Soldier must inform the Commission if there is a change in status, such as the intent to transition the requirement to DLA-TS.
- 4.2.1.5. Submitting orders and/or issuing a contract to the identified NPA for the initial fielding requirement.

4.2.2. The Commission will be responsible for:

- 4.2.2.1. Providing guidance and appropriate oversight to the CNA(s), who review the capability request to determine whether one or more qualified NPAs can fulfill a portion or all of the fielding requirement; if so, conduct the NPA recommendation process,¹ negotiate pricing and delivery schedule, and submit a proposed addition package.
- 4.2.2.2. Determining the suitability of the proposal submitted by the CNA IAW 41 CFR 51-2.4 and 51-2.5, to add the fielding requirements to the PL. This also includes assessing the level of impact the proposed addition will have on the domestic industrial base and other information deemed pertinent in determining the suitability of the proposed addition to the PL, not limited to comments and written data submitted by interested parties in response to Federal Register notices.
- 4.2.2.3. Ensuring that all PL suitability criteria and documentation requirements are met.
- 4.2.2.4. Providing notification to DLA-TS of the proposed addition and the percentage or quantities proposed by PEO-Soldier and recommended by the CNA. If DLA-TS can support the amount proposed by PEO Soldier, the Commission will add the product to the PL without any additional qualifications. If DLA-TS cannot support the addition at the amounts proposed by PEO-Soldier, the Commission will consider adding the requirement in a manner consistent with the equity interest of all parties.² Any dispute of the proposed addition, percentage, or quantities will be adjudicated in accordance with the dispute procedures at paragraph 6.5.
- 4.2.2.5. Approving, as appropriate, the addition of the items to the PL and establishing the Fair Market Price in coordination with the CNA/NPA and PEO Soldier and DLA-TS.

¹ The Commission will ensure that its guidance to the CNAs for the NPA recommendation process includes (1) consideration of the capability of the NPA(s) to meet the requirements for the particular sustainment item, (2) the NPA's capacity and performance on similar programs to ensure that the NPA can meet all quality and delivery requirements, (3) maintaining awareness of the long lead times for clothing & textile items, and the inability of commercial sources to immediately produce items when NPAs fall behind schedule when considering whether to propose the addition of all or a portion of the work to the PL, (4) where appropriate, ensuring that there is more than one NPA with the capability to manufacture critical safety items to avoid a potential failure and interruption to the supply of the critical safety item and to provide capacity to meet surge requirements, (5) considering the criticality of the item when determining whether to propose that all or only a portion of the sustainment requirement for critical safety items is added to the PL.

² To effectuate this approach, the Commission would need to concurrently assess both the suitability of the initial fielding requirement and the future sustainment requirement. For instance, the impact on a contractor might be minimal at the stage of initial fielding, but more substantial once the product progresses to sustainment. Before adding the item to the PL, the Commission would consider the potential contractor impact at each stage before determining whether to add a product to the PL in whole or in part IAW 41 CFR 51-2.5.

4.2.2.6. Issuing a notice of addition to the PL which specifies any scoping limitations IAW 41 CFR 51-2.4, 2.5, and 5.3.

4.2.3. DLA-TS will be responsible for:

4.2.3.1. Coordinating with PEO Soldier regarding required levels of support along with technical requirements. Such review will consider the potential effect on the domestic industrial base.

4.2.3.2. Informing the Commission of its potential sustainment requirements so that the Commission may consider DLA-TS's needs at the time of PL addition.

4.2.3.3. Providing the Commission with information regarding potential impact to existing contractors and DLA-TS's goals to manage the distribution of opportunities throughout the industrial base.

4.2.3.4. Providing any objections to, concerns regarding, or support for, any proposed initial fielding additions to the PL within 30 days of Commission (or CNA) notification.

4.3. Sustainment: Under this MOA, the Parties recognize the different priorities throughout the life cycle of the product from initial fielding to sustainment, and have agreed to establish the baseline obligation at the time a product is added to the PL. To facilitate this effort, the Parties agree as follows:

4.3.1. PEO Soldier will be responsible for:

4.3.1.1. Developing fielding requirements, and coordinating those requirements with DLA-TS to enable the transition to sustainment.

4.3.1.2. Providing technical support as needed to DLA-TS during the transition process.

4.3.1.3. Ensuring that the Commission is notified that there is no longer a need for products not intended for long-term sustainment so that such items are promptly removed from the PL.

4.3.2. The Commission will be responsible for:

4.3.2.1. Providing guidance and appropriate oversight to the CNA(s), who will evaluate whether a product continues to meet the Army's needs as production transitions from initial fielding to sustainment.

4.3.2.2. Reviewing any proposed changes to the PL for the sustainment work from the CNA/NPA and DLA-TS.

4.3.2.3. Approving, as appropriate, any request for increased quantities or percentages throughout the life cycle. For instance, if DLA-TS wishes to increase the baseline quantity/percentage established at the time of addition, it may coordinate a request through the responsible CNA to facilitate the desired change. Increases beyond the initial PL addition

are not binding until the Commission approves the increases and the change is properly reflected in the Federal Register (the PL).

- 4.3.2.4. Ensuring that all PL suitability criteria and documentation requirements are met.
- 4.3.2.5. Providing timely processing of any request for purchase exceptions, if, in the unlikely event, a NPA is unable to meet PEO Soldier's or DLA-TS's required delivery schedule.
- 4.3.2.6. Providing timely changes to the Fair Market Price, if necessary, as a product transitions from initial fielding to sustainment.
- 4.3.2.7. Unless agreed to in advance by the Parties, the Commission shall strive to process all "price impasse" requests within 60 days of receipt of business cases from the Parties.
- 4.3.2.8. Directing the CNAs' appropriate processing of a proposed deletion package when notified by DLA-TS that there is no longer a requirement for sustainment of the item.
- 4.3.2.9. Deleting the sustainment requirements for the item from the PL upon receipt of a proposed deletion package from the responsible CNA, including DLA-TS's notification that there is no longer a requirement for sustainment of the item.

4.3.3. DLA-TS will be responsible for:

- 4.3.3.1. Coordinating with the CNA/NPA to ensure that the authorized NPAs identified on the PL are continuing to meet DLA-TS's needs when the product transitions to sustainment.
- 4.3.3.2. Purchasing PL products at the quantities specified on the PL. If DLA-TS desires a greater quantity, it will coordinate with the responsible CNA to facilitate the necessary change.
- 4.3.3.3. Providing product and delivery concerns to the responsible CNA in a timely manner to ensure swift and responsive resolution.
- 4.3.3.4. Discussing and coordinating with the CNA/NPA, and the Commission, when appropriate, any new developments regarding the potential impact to the domestic industrial base, the potential impact to the warfighter, and the impact to the AbilityOne Program.
- 4.3.3.5. Working with the CNA/NPA to resolve all concerns regarding the Fair Market Price. If good faith negotiations fail, providing prompt notice to the Commission and CNA concurrently to request pricing support.
- 4.3.3.6. Coordinating with PEO Soldier and notifying the Commission and CNA/NPA when there is no longer a requirement for sustainment of an item on the PL and requesting that the requirement be deleted from the PL.

5. PERSONNEL: Each Party is responsible for supervision and management of its personnel.

6. GENERAL PROVISIONS:

6.1. POINTS OF CONTACT (POCS). The following POCs will be used by the Parties to communicate matters concerning this MOA. Each Party may change its POC upon reasonable notice to the other Party.

6.1.1. For the PEO Soldier—

6.1.1.1 Primary POC:

Michelle Self
Strategic Portfolio Manager
Project Manager, Soldier Survivability (PM-SSV)
10170 Beach Road, BLDG 325
Fort Belvoir, Virginia 22060
Email: michelle.l.self2.civ@army.mil

6.1.1.2. Alternate POC:

Jeffrey Myhre
Deputy Project Manager
Project Manager, Soldier Survivability (PM-SSV)
10170 Beach Road, BLDG 325
Fort Belvoir, Virginia 22060
Email: Jeffrey.j.myhre.civ@army.mil
Phone: 703-704-3325

6.1.2. For the Commission—

6.1.2.1. Primary POC:

Michael Jurkowski
Director of Business Operations (Acting)
U.S. AbilityOne Commission
355 E. Street, SW. Suite 325
Washington, DC 20024
Email: mjurkowski@AbilityOne.gov
Phone Number: 703-603-2117

6.1.2.2. Alternate POC:

Ramon Baretto

Business Management Specialist
U.S. AbilityOne Commission
355 E. Street, SW. Suite 325
Washington, DC 20024
Email: rbarreto@abilityone.gov
Phone Number: 703-603-2117

6.1.3. For the DLA-TS—

6.1.3.1. Primary POC:

William J. Kenny, SES
Head of Contracting Activity
Defense Logistics Agency, Troop Support
700 Robbins Avenue, Bldg. 45, 2nd Floor
Philadelphia, PA 19111
Email: william.kenny@dla.mil
Phone Number: 215-737-2304

6.1.3.2. Alternate POC:

Steven Merch
Director of Supplier Operations, Clothing & Textiles
Defense Logistics Agency, Troop Support
700 Robbins Avenue, Bldg. 3
Philadelphia, PA 19111
Email: steven.merch@dla.mil
Phone Number: 215-737-3220

6.2. CORRESPONDENCE. All correspondence to be sent and notices to be given pursuant to this MOA will be addressed, if to PEO Soldier, to—

6.2.1.

Michelle Self
Strategic Portfolio Manager
Project Manager, Soldier Survivability
10170 Beach Road, BLDG 325
Fort Belvoir, Virginia 22060

and, if to the Commission, to—

6.2.2.

Kimberly Zeich
Executive Director
U.S. AbilityOne Commission
355 E. Street, SW. Suite 325
Washington, DC 20024
Email: kzeich@abilityone.gov
Phone Number: 703-603-2130

And, if to DLA-TS, to –

6.2.3.

William J. Kenny, SES
Head of Contracting Activity
Defense Logistics Agency, Troop Support
700 Robbins Avenue, Bldg. 45, 2nd Floor
Philadelphia, PA 19111
Email: william.kenny@dla.mil

or as may from time to time otherwise be directed by the Parties.

6.3. REVIEW OF AGREEMENT. This MOA will be reviewed in its entirety no less often than mid-point on or around the anniversary of its effective date.

6.4. MODIFICATION OF AGREEMENT. This MOA may only be modified by the written agreement of the Parties, duly signed by their authorized representatives.

6.5. DISPUTES. Any disputes relating to this MOA will, subject to any applicable law, Executive Order, or DoD issuance, be resolved by consultation between the Parties.

6.5.1 The individuals listed as primary POCs in paragraph 6.1 shall be the primary points of contact to coordinate any disputes relating to this MOA. It is the intention of the parties that all disputes shall be resolved at the lowest possible level of authority as expeditiously as possible within the following framework. All timeframes for resolving disputes below may be lengthened by mutual consent.

6.5.2 Should the primary points of contract unable to agree, the matter shall be referred in writing as soon as practicable but in no event to exceed ten (10) working days after the failure to agree, to the secondary level points of contact (the individuals listed as alternate POCs in paragraph 6.1) or their mutually agreed upon representatives designated in writing.

6.5.3 Finally, should the secondary points of contact or their mutually agreed upon representatives designated in writing be unable to agree within ten

(10) working days, the matter shall be elevated to the General Officer/SES panel for resolution.

6.5.4 It is the intention of the parties that all disputes shall be resolved in this manner. Alternative dispute resolution methods may be used as agreed upon by the Parties.

6.6. TERMINATION OF AGREEMENT. This MOA may be terminated by any Party by giving at least 60 days' written notice to the other Parties. The MOA may also be terminated at any time upon the mutual written consent of the Parties.

6.7. TRANSFERABILITY. This MOA is not transferable except with the written consent of the Parties.

6.8. ENTIRE AGREEMENT. It is expressly understood and agreed that this MOA embodies the entire agreement between the Parties regarding the MOA's subject matter, thereby merging and superseding all prior agreements and representations by the Parties with respect to such subject matter.

6.9. EFFECTIVE DATE. This MOA takes effect beginning on the day after the last Party signs.

6.10. EXPIRATION DATE. This MOA expires ten years after the effective date.

6.11. NO THIRD PARTY BENEFICIARIES. Nothing in this MOA, express or implied, is intended to give to, or will be construed to confer upon, any person or entity not a party any remedy or claim under or by reason of this MOA and this MOA will be for the sole and exclusive benefit of the Parties.

6.12. SEVERABILITY. If any term, provision, or condition of this MOA is held to be invalid, void, or unenforceable by a governmental authority and such holding is not or cannot be appealed further, then such invalid, void, or unenforceable term, provision, or condition shall be deemed severed from this MOA and all remaining terms, provisions, and conditions of this MOA shall continue in full force and effect. The Parties shall endeavor in good faith to replace such invalid, void, or unenforceable term, provision, or condition with valid and enforceable terms, provisions, or conditions which achieve the purpose intended by the Parties to the greatest extent permitted by law.

6.13. OTHER FEDERAL AGENCIES. This MOA does not bind any federal agency, other than the Parties, nor waive required compliance with any law or regulation.

7. FINANCIAL DETAILS. This MOA does not provide for reimbursement between the Parties.

8. LIST OF ATTACHMENTS: N/A

AGREED:

FOR PEO SOLDIER:



CHRISTOPHER D. SCHNEIDER
Brigadier General, USA
Program Executive Officer Soldier

1 Nov 23

DATE

FOR THE COMMISSION:

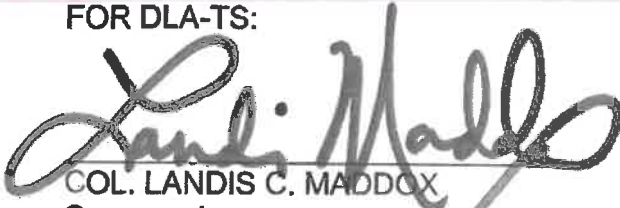
Kimberly
M. Zeich

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Date: 2023.10.02
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KIMBERLY ZEICH
Executive Director
AbilityOne Commission

DATE

FOR DLA-TS:



COL. LANDIS C. MADDOX
Commander
Defense Logistics Agency - Troop Support

27 Sept 23

DATE