

U.S. AbilityOne Commission
Notice of Proposed Rulemaking
“Supporting Competition in the AbilityOne Program”

Frequently Asked Questions

March 10, 2023

Q. What is the U.S. AbilityOne Commission’s proposed rule on “Supporting Competition in the AbilityOne Program”?

A. The proposed rule would amend the U.S. AbilityOne Commission’s (Commission) regulations at 41 C.F.R. Part 51 to support limited competition within the AbilityOne Program.

The rule can be found at www.regulations.gov using the identifier RIN 3037-AA14.

Q. What changes would the proposed rule make in the AbilityOne Program?

A. The proposed rule would:

- (1) Clarify the Commission’s authority to consider different pricing methodologies in establishing the Fair Market Price (FMP), which is the price charged for a product or service on the AbilityOne [Procurement List](#).
- (2) Better define the parameters for conducting fair and equitable competitive allocations among multiple qualified Nonprofit Agencies (NPAs) within the AbilityOne Program for Federal customer service requirements that are expected to exceed \$10 million in total contract value, or in instances where bilateral negotiations between the NPA and the Federal agency have failed.
- (3) Clarify the responsibilities and procedures associated with authorizing and deauthorizing NPAs, including ensuring that, to the maximum extent practicable, the jobs of incumbent employees who are blind or have other significant disabilities are protected if an NPA is deauthorized and its work is reallocated within the AbilityOne Program.

Q. Why is the Commission proposing a competition rule now?

A. The Commission has been listening to our Federal customers who buy AbilityOne products and services. They have made clear that for their largest AbilityOne purchases, they may want to be involved in selecting the best NPA that can do the best job. Our Federal customers strongly support conducting a limited competitive process, within the AbilityOne Program, to get the best NPA for the work.

In addition, the proposed rule incorporates [recommendations](#) addressing competition and other topics from the “Panel on Department of Defense and AbilityOne Contracting Oversight, Accountability, and Integrity” review mandated by section 898 of the National Defense Authorization Act for Fiscal Year 2017.

The panel issued its [Fourth and Final Report to Congress](#) in January 2022.

The mission of the Panel, in part, was to assess the overall effectiveness and internal controls of the AbilityOne Program related to Department of Defense (DoD) contracts and provide recommendations for changes in business practices.

The Commission found significant utility in the Panel’s work and agreed with many of its recommendations.

Even though the Panel’s efforts were focused on the interplay between AbilityOne and DoD procurements, the Commission recognized that many of the Panel’s findings applied to the entire Program.

Specifically, the Panel raised numerous concerns about the lack of transparency and perceptions of an unequal playing field in how NPAs are selected compared to the normal Federal Government competitive procurement process.

The Commission acknowledges that the process to recommend and authorize an NPA to provide an AbilityOne product or service may appear opaque from an outside perspective.

The regulatory changes proposed in the proposed rule take affirmative steps toward clarifying the process and modifying the NPA selection process with the goal of best meeting the needs of the Federal customer.

Q. What actions recommended by the 898 panel are incorporated in this proposed rule?

A. The following four actions recommended by the 898 panel are included in the proposed rule:

- Require CNAs to consider price, technical capability, and past performance when making an NPA allocation decision.
- Establish policy and business rules for competition and re-competition of the Procurement List (PL) within the AbilityOne Program.

- Revise 41 CFR 51 to include information regarding deauthorization of NPAs as the authorized source on the Procurement List.
- Protect, to the maximum extent practicable, the jobs of incumbent employees who are blind or have other significant disabilities if an NPA is deauthorized and its work is reallocated within the AbilityOne Program.

Q. What is the expected impact of the rule? How many NPAs will be affected?

A. The rule changes would apply equally across all Federal agencies, but the Department of Defense (DoD) would be engaged the most in the proposed competitive processes, due to the number and size of DoD's AbilityOne requirements.

While the proposed changes are applicable to all NPAs, the Commission estimates that the changes would have the most impact on approximately 27 percent (122) of the approximately 450 NPAs currently qualified to participate in the Program. Each of the 122 NPAs currently has at least one service contract with a total contract value expected to exceed \$10 million.

This group of NPAs performs approximately 346 services contracts, which total an annual revenue of roughly \$3.07 billion. Approximately half of that amount (\$1.63 billion) is concentrated among 23 qualified NPAs.

Q. The AbilityOne Program currently considers technical capability and past performance in evaluating an NPA for a contract. The proposed rule adds price as a selection criterion. Will this create a "race to the bottom" where the lowest bidder will receive the contract?

No. The proposed rule includes price as only one of the three primary selection criteria, the others being technical capability and past performance. Therefore, under the proposed rule, the Commission will not consider price alone as the deciding factor in NPA selection, and the lowest proposed price will not guarantee selection.

The Commission will retain its authority to determine a Fair Market Price, which ensures a price that is not too low.

Q. Will introducing competition into the AbilityOne Program create a risk of jeopardizing or eliminating jobs for people who are blind or have significant disabilities?

A. Some competition exists in the program today, particularly when new assignments are made for products or services to be added to the AbilityOne Procurement List. The rule was specifically written to protect the direct labor jobs of employees who are blind or have other significant disabilities if an incumbent AbilityOne NPA contractor is not awarded the subsequent AbilityOne contract. The employees who are blind or have disabilities will have the right of first refusal for positions when work is reallocated within the AbilityOne Program.

Q. What are the benefits of the proposed rule?

A. The proposed regulatory changes will directly address some of the perceptions about AbilityOne’s current practice that have given rise to criticism, namely a perceived lack of transparency in the NPA selection process, a perception of NPA complacency after receiving an authorization, and the inability to consider price on a competitive basis when selecting an NPA.

The proposed regulatory changes will directly address each concern by providing greater customer involvement in NPA selection, creating a mechanism to incentivize better performance, and encouraging more competitive pricing. The benefits will be:

- *Increased Transparency* – For PL additions of more than \$10 million in total contract value, inclusive of the base period and all options periods, the proposed changes provide Federal agencies the option to request a competitive allocation. A significant component of that request requires the Federal agency to state “whether it will provide resources to support the process.” The Federal agency is not required to provide resources, but in the past the Commission has found great utility in involving the Federal customer in assisting with evaluating NPA technical capabilities, past performance, and pricing.

With the proposed changes, both the Commission and the Federal customer will obtain greater understanding and visibility into the NPA selection process.

- *Incentivize Better Performance* – The AbilityOne Program was created to allow Federal agencies to issue orders on a sole-source basis to qualified NPAs. The proposed competitive procedures will not change that. In fact, service requirements below the specified dollar threshold will not be significantly impacted by the proposed changes, and AbilityOne requirements for products are not covered by the proposed rule. However, NPAs involved in servicing higher dollar requirements will have to be more responsive to market forces and innovative practices to maintain their positions as mandatory sources. The Commission believes that the prospects of a competitive allocation every 5 - 10 years is an appropriate motivator.

iii. *More Competitive Pricing* – The AbilityOne Program has been a trusted source to Federal agencies since 1938. To remain a trusted source, qualified NPAs must deliver high-quality commodities and services in a timely manner at a competitive price. Nevertheless, on the basis of two pilot tests it has conducted, the Commission believes that price competition at the pre-selection stage, when compared to bilateral negotiations after NPA selection, can have some very tangible benefits to the Federal government through cost savings.

Q. What costs is the new rule likely to impose?

A. The Commission believes that the potential costs from implementation of the proposed changes are greatly outweighed by the benefits to the NPA community, the CNAs, and the Federal Government.

For more details, see the “Cost of Proposed Rule” section of the proposed rule.

Q. Would the proposed rule affect only NPAs doing business with the Department of Defense, or will NPAs doing business with other Federal agencies and departments also be affected?

A. The proposed rule would apply to AbilityOne contracts with all Federal customers that are expected to exceed \$10 million, or in instances where bilateral negotiations between the NPA and the Federal customer have failed for a service on the Procurement List.

Q. Will contracts for products as well as services be affected?

A. No. The rule applies only to services. The portion of the rule that defines the parameters for conducting fair and equitable competitive allocations applies to service requirements that are expected to exceed \$10 million in total contract value, or in instances where bilateral negotiations between the NPA and the Federal agency have failed.

Q. What is the deadline for submitting comments on the proposed rule?

A. The deadline for submitting comments on the proposed rule is May 11, 2023.

To locate the proposed rule, search for “RIN 3037-AA14” on www.regulations.gov. Follow the instructions for submitting comments. Please be advised that comments received will be posted without change, including any personal information provided.

Q. What are the next steps in the proposed rulemaking?

The Commission will consider comments on the proposed rule submitted to www.regulations.gov (see above). After considering the comments, the Commission will finalize the rule. The final rule will be published in the Federal Register.

Q. What gives the Commission the authority to make the proposed changes?

A. The Javits-Wagner-O'Day Act (41 U.S.C. 8501-8506) gives the Commission the authority to prescribe and amend regulations regarding its administration of the Procurement List and other matters as necessary to carry out the Act.