(d)(1) *Handwritten signature.* A design patent practitioner must indicate their design patent practitioner status by placing the word ''design'' (in any format) adjacent to their handwritten signature. Each piece of correspondence, except as provided in paragraphs (d)(2) through (5) and (f) of this section, filed in an application, patent file, or other proceeding in the Office that requires a person's signature, must:

* * * * *

(4) *Additional electronic signatures.* Correspondence being filed in the USPTO for a patent application, patent, or other patent proceeding at the USPTO which requires a signature may be signed using an electronic signature that is personally entered by the person named as the signer and of a form specified by the Director.

(i) A patent practitioner (§ 1.32(a)(1)), signing pursuant to § 1.33(b)(1) or (2), must supply their registration number either as part of the electronic signature or immediately below or adjacent to the electronic signature. A design patent practitioner must additionally indicate their design patent practitioner status by placing the word ''design'' (in any format) adjacent to the electronic signature.

(ii) The signer's name must be:

(A) Presented in printed or typed form preferably immediately below or adjacent to the electronic signature; and

(B) Reasonably specific enough so that the identity of the signer can be readily recognized.

(5) * * *

(ii) *Certification as to the signature.* The person inserting a signature under paragraph (d)(2), (3), or (4) of this section in a document submitted to the Office certifies that the inserted signature appearing in the document is the person's own signature. A person submitting a document signed by another under paragraph (d)(2), (3), or (4) is obligated to have a reasonable basis to believe that the person whose signature is present on the document was actually inserted by that person, and should retain evidence of authenticity of the signature. Violations of the certification as to the signature of another or a person's own signature as set forth in this paragraph (d)(5)(ii) may result in the imposition of sanctions under § 11.18(c) and (d) of this chapter.

* * * * *

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2024–06126 Filed 3–21–24; 8:45 am]

BILLING CODE 3510–16–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

41 CFR Parts 51–2, 51–3, and 51–5

RIN 3037–AA14

Supporting Competition in the AbilityOne Program

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Final rule.

SUMMARY: The Committee for Purchase From People Who Are Blind or Severely Disabled (Committee), operating as the U.S. AbilityOne Commission (Commission), is publishing a final rule that clarifies the Commission's authority to consider different pricing methodologies to establish the initial Fair Market Price (FMP) for Procurement List (PL) additions and changes to the FMP. The final rule also permits the central nonprofit agency (CNA) to distribute certain high-dollar services orders on a competitive basis to the authorized nonprofit agency (NPA) after considering price and non-price factors. Lastly, the final rule further clarifies the Commission's authority to authorize and deauthorize NPAs as mandatory sources and require all NPAs to provide the right of first refusal of employment to the current employees of an incumbent NPA who are blind or have other significant disabilities for positions for which they are qualified.

DATES: This final rule is effective April 22, 2024.

FOR FURTHER INFORMATION CONTACT: Cassandra Assefa, Regulatory and Policy Attorney, Office of General Counsel, U.S. AbilityOne Commission, 355 E Street SW, Suite 325, Washington, DC 20024; telephone: (202) 430–9886; email: *cassefa@abilityone.gov.*

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Javits-Wagner-O'Day (JWOD) Act and the Commission

The JWOD Act, 41 U.S.C. 8501, *et seq.,* leverages the purchasing power of the Federal Government to create employment opportunities through the AbilityOne Program for individuals who are blind or have significant disabilities. The Program is administered by the 15-member, presidentially appointed Commission that, as an independent Federal agency, maintains a PL of products and services that Federal agencies must purchase from participating NPAs who employ individuals who are blind or have significant disabilities. *See* 41 U.S.C.8503 and 8504. CNAs are responsible for distributing orders to Commission-approved NPAs to provide products and services to Federal agencies. *See* 41 CFR parts 51–2.4(a)(3) & 51–3.4. NPAs must meet initial qualification requirements and maintain those qualifications throughout their participation in the AbilityOne Program. *See* 41 CFR parts 51–4.2 and 51–4.3.

The Commission has five roles stated in the JWOD Act. First, the Commission decides on the addition or removal of products and services on the PL. *See* 41 U.S.C. 8503(a). Second, the Commission sets the FMP that the Federal Government will pay for the products or services. *See* 41 U.S.C. 8503(b). Third, the Commission designates nonprofit agencies to serve as CNAs, who are responsible for ''facilitating the distribution of orders'' for products or services among participating NPAs. *See* 41 U.S.C. 8503(c). Fourth, the Commission promulgates regulations ''on other matters as necessary'' to carry out the JWOD Act. *See* 41 U.S.C. 8503(d)(1). Fifth, the Commission engages in a ''continuing study and evaluation of its activities'' to ensure effective administration of the JWOD Act. *See* 41 U.S.C. 8503(e).

At present, pursuant to the JWOD Act, the Commission has designated National Industries for the Blind (NIB) and SourceAmerica as the CNAs responsible for distributing orders to participating NPAs. *See* 41 CFR 51–1.3 (definition of CNA); *see* also 41 CFR 51–3.2 (describing duties of a CNA). The CNAs provide information to the Commission as needed and otherwise assist the Commission in implementing the Commission's regulations. NPAs associated with NIB primarily employ individuals who are blind or visually impaired; NPAs associated with SourceAmerica primarily employ individuals with other significant disabilities, including intellectual and developmental disabilities (IDD). As of September 30, 2023, NIB represents 58 NPAs participating in the AbilityOne Program, and SourceAmerica represents 355 NPAs.

In making its determination on whether to add a product or service to the PL, the Commission assesses four suitability criteria. *See* 41 CFR 51–2.4. First, the Commission considers whether there is the potential for the NPA to employ enough individuals who are blind or have significant disabilities as needed to carry out the contract.

Second, the Commission determines whether the recommended NPAs meet all the qualification requirements set forth in 41 CFR part 51–4. Third, the Commission assesses the capability of the recommended NPAs to provide the product or service, including the required labor operations, Government quality standards, and delivery schedules. Finally, if there is a current contractor providing the product or service, the Commission determines if there would be an adverse impact on that contractor if the proposed requirement is placed on the PL.

B. The Need for Rulemaking

The 898 Panel

Section 898(a)(1) of the National Defense Authorization Act (NDAA) for Fiscal Year 2017 [Hereinafter referred to as the Act] [1] directed the Secretary of Defense to establish a panel of senior level representatives from the Department of Defense (DoD) agencies, the Commission, and other Federal Government agencies to address the effectiveness and internal controls of the AbilityOne Program related to DoD contracts [Hereafter referred to as the Panel]. The Panel consisted of representatives from the Office of the Secretary of Defense and its DoD Inspector General, the Commission, and the Commission's Inspector General, as statutory members. The Panel's membership also consisted of senior leaders and representatives from the military service branches, Department of Justice, Department of Veterans Affairs, Department of Labor, the General Services Administration, the Department of Education, and the Defense Acquisition University.

The primary mission of the Panel was to identify both vulnerabilities and opportunities in DoD contracting within the AbilityOne Program and, at a minimum, recommend improvements in the oversight, accountability, and integrity of the Program. Of specific relevance to this rulemaking, the Panel was directed to make recommendations for increasing employment opportunities for individuals who are blind or have significant disabilities, especially service-disabled veterans, and recommend ways to explore opportunities for competition among qualified NPAs to ensure equitable selection in work allocations. The Panel was required to provide an annual report to Congress on its activities not later than September 30, 2017, and annually thereafter for the next three years.[2]

The first annual report from the Panel was submitted to Congress in July 2018 and its final report was submitted in January 2022. During its four-year tenure, the Panel established seven subcommittees that aligned with the duties described in Section 898(c), with the Acquisition and Procurement subcommittee, also known as Subcommittee Six, addressing the acquisition and procurement duties. Subcommittee Six identified ten findings that led to initial recommended actions for implementation.

The most germane finding from Subcommittee Six called on the Commission to implement price-inclusive NPA selection procedures and conduct pilot tests that include DoD and Commission-led evaluations and recommendations.

Although the Panel's recommendations were not binding on the Commission, subsection (f)(2) of the Act directed the Commission to make a good faith effort to implement its recommendations.[3] If the Commission unduly delayed or ignored the Panel's recommendations, the Secretary of Defense was given the authority to ''suspend compliance with the requirement to procure a product or service in Section 8504 of title 41, United States Code.'' [4] Currently, DoD procurements represent more than half of the Program's annual sales, which creates procurement opportunities that employ over 18,275 individuals with significant disabilities or who are blind.[5] If the DoD were to withdraw from the Program, or even reduce participation, the results would greatly harm the objectives of the Commission.

Pilot Tests at Fort Bliss and Fort Meade

In October 2018, the Commission partnered with officials from the Army's Mission Installation Contracting Command (MICC) and Installation Management Command (IMCOM) to work on a competitive NPA selection process incorporating the key aspects of recommendations from Subcommittee Six.[6] The parties selected the Facility Support and Operations Service (FSOS) contract at Fort Bliss, TX, for the first pilot and selected a second pilot, for similar services, at Fort Meade, MD, the following year. At the time, the Fort Bliss FSOS contract, valued at over $300 million in total contract value, was the highest dollar value contract in the AbilityOne Program.[7] The Fort Meade requirement had a total contract value of approximately $98 million.

The Commission had three objectives for conducting both pilots: first, to test a way to include price as a factor in the NPA selection process; second, to determine how to integrate personnel and resources from the requesting Federal agency into the NPA evaluation process; and third, to explore ways to compete, and potentially authorize a different NPA to perform on an existing PL requirement.[8] Both pilots were instructive in providing positive insights to the subcommittee and the Commission as to the last two questions. But the pilot at Fort Meade provided another equally valid insight to the first question, when the Commission was enjoined from completing the competitive pilot at Fort Meade due to a successful challenge at the Court of Federal Claims (COFC).[9]

The petitioner raised several arguments against the permissibility of conducting the Fort Meade pilot, but the

[1] National Defense Authorization Act for Fiscal Year 2017, Public Law 114–328, sec. 898(a)(1) (2016).

[2] Each report can be found at *https://www.acq.osd.mil/asda/dpc/cp/policy/abilityone.html.*

[3] *Supra* note 1. Since the Panel sunset when it submitted its final report to Congress in accordance with (IAW) part (j) of the Act, it is debatable as to whether the Secretary of Defense continues to retain the authority to invoke the authority described at (f)(2). However, in the fourth and final report to Congress the Panel identified numerous recommendations that remained incomplete, such as the recommendation related to competition (Recommendations 10 & 11).

[4] *Supra* note 1 at (g)(1)(A).

[5] Employment numbers are based on estimates from SourceAmerica (15,600) and the National Industries for the Blind (2,675) at the close of fiscal year 2023. These numbers include employees working under service and product contracts.

[6] The MICC is a subordinate Command of the Army Contracting Command (ACC) and is responsible for the procurement of products and services for thirty-two Army Installations located throughout the Continental United States. IMCOM is a subordinate Command of the U.S. Army Materiel Command and is responsible for the day-to-day management of Army Installations around the globe. Currently, at least 18,000 AbilityOne workers support DoD contracts and a vast majority of work on contracts administered by the MICC for IMCOM installations.

[7] Report on the 2018–2019 Competition Pilot Test for AbilityOne Program Nonprofit Agencies Facility Support and Operations Services Contract Fort Bliss, Texas. AbilityOne Commission Report on Competition Pilot Test at Fort Bliss, Texas 2018–2019

[8] ''Social impact'' was a term of art that was prevalent at the time, but the first attempt to operationalize that component was in the context of the Fort Knox pilot described below.

[9] *Melwood Horticultural Training Center, Inc.* v. *United States,* 153 Fed. Cl. 723, 737 (2021). The AbilityOne Commission decided to implement, through an interim policy, a pilot program to use competitive procedures for a base support contract at Fort Meade. The pilot program included price as part of the competition selection criteria. Melwood challenged the Commission's ability to undertake a pilot without having previously gone through the rulemaking process. The court ultimately enjoined the Commission from implementing this type of change to the procurement process through an interim policy.

COFC focused on a narrow provision at 41 CFR part 51.2–7(a) of the regulatory language that signaled a preference for bilateral negotiations. The same regulation permitted use of other pricing methodologies, but COFC opined that other pricing methodologies could only be used ''if agreed to by the negotiating parties.'' The COFC further reasoned that the negotiating parties were limited to the NPA, the contracting activity, and the central nonprofit agency. As a result of this reading, the COFC found that the price component at issue in that case conflicted with the ''collaborative pricing process'' contemplated under 41 CFR part 51–2.7. The Commission posits that such an interpretation is not consistent with the Commission's statutory authority to establish the FMP, or the general thrust of the regulation. The JWOD Act unambiguously authorizes the Commission, not the negotiating parties, to establish the FMP and to revise it ''in accordance with changing market conditions.'' [10]

The proposed changes to § 51–2.7 are intended to harmonize the statute and regulation to eliminate any ambiguity surrounding the Commission's authority to establish the FMP, by making it clear that it is not limited to an agreement between the parties when the Commission utilizes other pricing methodologies to establish or change the FMP.[11] In the Fourth Panel Report to Congress, the Commission Chairperson acknowledged the regulatory impasse created by the COFC decision, but explained that the Commission would be taking steps ''to strengthen its authority in this area.'' [12] This rulemaking is an effort to carry out that pledge.

Despite some setbacks, the Commission was encouraged by the results of the pilots because each test demonstrated that including price as a factor, coupled with a ''customer focused'' NPA selection ethos, can provide promising results for the Federal customer and the Program. However, the Commission was also mindful of the COFC decision and the need to ensure that competition within the Program does not frustrate other modernization initiatives and the Commission's ability to encourage employment growth for employees who have significant disabilities and who are blind.[13]

The Commission's Five-Year Strategic Plan

The Notice of Proposed Rule Making (NPRM) explained how this rulemaking was also heavily informed by the Commission's Strategic Plan for Fiscal Year (FY) 2022–2026, issued in June 2022.[14] The Strategic Plan, a policy road map for next five years, is anchored by four Strategic Objectives:

(1) Expand competitive integrated employment (CIE) for people who are blind or have other significant disabilities.

(2) Identify, publicize, and support the increase of good jobs and optimal jobs in the AbilityOne Program.[15]

(3) Ensure effective governance across the AbilityOne Program.

(4) Partner with Federal agencies and AbilityOne stakeholders to increase and improve CIE opportunities for individuals who are blind or have other significant disabilities.

These four objectives represent a deliberate shift to align the Program with contemporary disability policy and modern business practices.[16] The Commission realizes that some reforms will require specific legislative actions to fully implement, such as potential changes to the seventy-five percent direct labor hour ratio requirement. *See* 41 U.S.C. 8501(6)(C) & (7)(C). Other reforms, however, can be made by updating existing regulations and policies. For example, in November 2023, the Commission finalized Commission Policy 51.400, which introduced the long-term objective of providing job individualizations, employee career plans, and career advancement programs.[17] The Commission has also made numerous regulatory changes throughout its history, the most recent being the elimination of 14(c) certificates within the Program in 2022.[18]

Other Reasons for This Rulemaking

Although Section 898 authorizes the Secretary of Defense to suspend compliance with the Program if the Commission does not substantially implement the Panel recommendations, that isn't the only risk the Program faces.[19] Even if the DoD does not withdraw from the Program, it has other alternatives even for existing AbilityOne requirements. Increased competition can help to serve as a countermeasure to better protect existing PL work from other procurement actions or insourcing.[20] According to a 2018 Government Accountability Office (GAO) study, the DoD ''budgets about $25 billion annually to operate its installations,'' but it has been under pressure since 1997 to ''reduce its installation support cost.'' [21] The GAO further noted that the ''DoD needed to show measurable and sustained progress in reducing installation support costs and achieving efficiencies in installation support.'' [22] In 2013, Congress provided military services the authority to enter into Intergovernmental Support Agreements (IGSAs) with local and state governments to receive and provide or share installation support services.[23] The Army, with a current portfolio of approximately 122 IGSAs, routinely uses IGSAs as a procurement tool to

[10] 41 U.S.C. 8503(b). It should be noted that a ''collaborative pricing process'' is not contemplated under the statute. The authority to establish the FMP rests solely with the Commission.

[11] It should also be noted that the regulatory language discussed in the ruling was only added as the result of a regulatory change in 1999. The Commission posits that the purpose of that change was to signal a preference for bilateral negotiations. It was not intended to limit the Commission's authority to consider and use other pricing methodologies.

[12] *Supra* note 2 at Appendix A.

[13] The AbilityOne Program is an employment program, but the Commission does not create jobs. Jobs are created through Federal contracts performed by NPAs in the Program. Competition may or may not result in greater job growth for any individual contract, but by carrying out a primary objective of the Panel, it should help to retain existing work and make the Program a more attractive option for Federal customers.

[14] AbilityOne Strategic Plan for FY 2022–2026. *www.abilityone.gov/commission/documents/AbilityOne%20Strategic%20Plan%20FY%202022–2026%20Final.pdf.*

[15] *Id.* The Commission defines a ''good job'' in the AbilityOne Program as having four attributes: 1. Individuals with disabilities are paid competitive wages and benefits; 2. The job matches the individual's interests and skills (''job customization''); 3. Individuals with disabilities are provided with opportunities for employment advancement comparable to those provided to individuals without disabilities; and 4. Individuals are covered under employment laws. An ''optimal job'' as one that includes the four attributes of a ''good job,'' but also allows AbilityOne employees to work side-by-side with employees without disabilities doing the same or similar work.

[16] *Id.*

[17] *www.abilityone.gov/laws,_regulations_and_policy/documents/Commission%20Policy%2051.400%20AbilityOne%20Commission%20Compliance%20Program%20-%20Jan%201,%202024%20-%20signed%20-%20508.pdf.*

[18] *https://www.federalregister.gov/documents/2022/07/21/2022-15561/prohibition-on-the-payment-of-subminimum-wages-under-14c-certificates-as-a-qualification-for.*

[19] *Supra* note 1.

[20] *See* § 51–6.12(d). With 90-days' notice, a Federal agency could elect to perform work with Government employees if it determines it is more cost effective to do so (or any other reason), rather than continue contract performance with an AbilityOne NPA.

[21] *https://www.gao.gov/assets/gao-19-4.pdf.*

[22] *Id.*

[23] *See* the National Defense Authorization Act for Fiscal Year 2013, Public Law 112—239, § 331 (2013). In the Carl Levin and Howard P. ''Buck'' McKeon National Defense Authorization Act for Fiscal Year 2015, Public Law 113—291, § 351 (2014) (codified as amended at 10 U.S.C. 2679), Congress clarified the authority to enter into an IGSA, and transferred the provision from 10 U.S.C. 2336 to 10 U.S.C. 2679.

reduce administrative burdens and achieve greater cost savings as compared to traditional government contracting.[24] Although the DoD has placed some local policy limitations on the use of IGSAs to displace a contract in the AbilityOne Program,[25] those limitations are not absolute.[26]

For example, in 2017, the Army and the incumbent NPA were embroiled in a dispute over the price of the follow-on AbilityOne contract for installation support at Fort Polk (renamed Fort Johnson effective June 13, 2023) in Louisiana. The Army estimated the new contract price at $75 million over five years, whereas the NPA's price estimate was approximately $115 million. After eight months of unsuccessful negotiations, the Army stated they were considering the conversion of the Fort Polk requirement to an IGSA with the City of Leesville, LA. Only after direct intervention by the Deputy Assistant Secretary of the Army for Procurement (DASA(P)), were the two sides able to agree on a price.[27] A new contract was awarded on May 31, 2018, for a price of $75,984,926 over five years—thus averting the conversion to an IGSA. The Commission believes that for certain high dollar contracts it is far more advantageous for the Government to create a competitive environment where NPAs are competing against other NPAs, rather than risk the Federal customer converting an existing requirement within the Program to performance under an IGSA. Simply put, when competition leads to the addition of a new requirement to the Program or the retention of an existing requirement, it is a gain. When the lack of competition leads the DoD to move an existing requirement to an IGSA, it is a loss to the Program.

Proof of Concept: The Fort Knox Pilot

In November 2022, using prior pilots, the Commission's Strategic Plan, and the COFC decision as a roadmap, the Commission authorized the execution of a pilot at Fort Knox that supported several objectives described in the Commission's 5-year strategic plan, such as creating good and optimal jobs while providing the ''best value'' to the Federal customer.[28] To accomplish this goal, the pilot was divided into two distinct, but interdependent phases. Phase I began in mid-January of 2023 with the issuance of an Opportunity Notice (ON),[29] which fully explained the ground rules for participation. After responses were received, SourceAmerica, the responsible CNA, assessed and recommended two capable nonprofit agencies to the Commission for consideration as authorized sources. 41 CFR 51–3.2(d). Phase I ended when the Commission, after considering the suitability criteria at § 51–2.4, authorized both NPAs to compete in Phase II. The decision to authorize the NPAs was based on both NPAs meeting or exceeding the necessary management capability, experience, demonstration of employment potential through proposed placement program participation,[30] and having an effective workforce integration plan.[31]

On June 5, 2023, Phase II commenced. In Phase II, SourceAmerica was directed to select the NPA providing the best value to the Federal customer, after considering technical capability, past performance, and price. Although price was a selection factor, the Commission directed SourceAmerica to ensure that price did not have greater weight than the non-price factors in the final NPA selection decision.[32] For the evaluation, the Army provided technical expertise to assist with all evaluation factors, and SourceAmerica made its selection on October 19, 2023. After the NPA selection, the Commission received the pricing information and a recommendation from SourceAmerica for the FMP. In early November, the Commission established the FMP, principally relying on the results of the Phase II price competition to support its determination.[33]

The execution and results of this test pilot illustrate one of several potential approaches to address the Panel objectives. The NPA selected for the Total Facilities Maintenance (TFM) contract will create nearly fifty percent more jobs for individuals who have significant disabilities than the predecessor contractor.[34] The other NPA in the competition would have created approximately the same number of jobs for individuals with significant disabilities, but at a somewhat higher cost than the selected NPA.[35]

Like the previous two pilots, Fort Knox was identified and executed after senior leader coordination and approval from the Army and the AbilityOne Commission.[36] This approach ensured excellent lines of communication and robust responsiveness from the early stages of requirement development to NPA selection and contract award. Once this rule is finalized, similar coordination, collaboration, and approval will be a critical component for implementing this rule.

C. Notice of Proposed Rulemaking (NPRM)

On March 13, 2023, the Commission issued an NPRM in the **Federal Register**.[37] The proposed rule clarified the Commission's authority to consider different pricing methodologies in establishing the FMP for PL additions and changes to the FMP; defined the parameters for conducting competitive distributions among multiple qualified

[24] *See https://www.army.mil/article/263529/historic_statewide_intergovernmental_support_agreement_signed.*

[25] Panel on Department of Defense and AbilityOne Contracting Oversight, Accountability, and Integrity 2018 First Annual Report to Congress, footnote 38.

[26] *Id.*

[27] *Id* at 22–23.

[28] The contract, covering 109,054 acres and 2,326 buildings, is to provide Total Facility Maintenance (TFM) across several functional areas, such as building and structure maintenance, snow and ice removal, landscaping services, utility system maintenance, and other maintenance.

[29] The ON acts as a solicitation from the CNA to the NPA community, which describes, at a minimum, the requirements, necessary NPA qualifications, the period of performance, and any other special consideration established by the CNA or Commission.

[30] Placement Program criteria include evaluation factors related to the NPA's ability to promote upward mobility and/or placement of individuals with disabilities outside the AbilityOne Program. Such factors include but are not limited to training, qualifications of the NPA's personnel supporting placements, placement support services, and/or leveraging referral sources to support placements.

[31] Integrated Work Environment criteria include evaluation factors related to how the NPA plans to achieve and maintain an integrated work environment.

[32] 88 FR 17553 (2023).

[33] Commission Decision Document, voted and approved on May 25, 2023. The Commission approved the following actions: (1) Approval to transfer the Commission's authority to perform the Fort Knox, Kentucky, Total Facilities Maintenance (TFM) Procurement List (PL) service (Procurement List #/Project #: 2004789/121674) from SourceAmerica to a qualified, capable nonprofit agency (NPA) at a Fair Market Price (FMP). (2) Authorization of Skookum and PCSI to serve in tandem as mandatory sources. (3) Authorize the use of a multi-factor process (with a price component) for final selection of the NPA that will perform the TFM. (4) Approve an NPA project-level ratio of less than 75 percent (but greater than 40 percent) for the 5-year pilot test period. (5) Approve the use of price competition as the methodology for establishing the Fair Market Price (FMP)—to be completed in Phase II.

[34] The previous requirement earmarked 34 positions for individuals who have significant disabilities under the total facilities maintenance requirement (30 were filled at the time of the competition). The newly selected NPA is expected to fill 45 of its available positions with individuals who have significant disabilities.

[35] NPA selection information on file with the Commission. The final rule adopts some of the lessons from the Fort Knox pilot, although it adds the component of assessing an NPA's capacity to provide training and placements at the final stage of determining the NPA that will receive the contract.

[36] Memorandum of Understanding between the MICC, IMCOM, SourceAmerica, and the Commission, executed on September 14, 2022. On file with the Commission.

[37] 88 FR 15360 (2023).

NPAs; clarified the Commission's authority to authorize or deauthorize a NPA; and provided a right of first refusal of employment to the current employees of an incumbent NPA who are blind or have other significant disabilities for positions for which they are qualified.

The initial comment period was open for 60 days but was extended another 30 days for additional comments. After the comment period closed on June 12, 2023, the Commission had received 95 comments from various stakeholders and interested parties.[38] Comments were received from NPAs (50), both CNAs (2), private individuals (27), disability rights organizations (2), NPA advocacy groups (3), and anonymous commenters (11). The level of support also varied, with 6 commenters supporting the rule unconditionally, 40 others supported the rule subject to certain conditions, 45 commenters opposed the rule, and 4 comments were neutral or administerial in nature. One additional comment was received during the interagency review period from a disability rights advocacy group opposing the rule.

Of the 50 responding NPAs, 16 NPAs provided a comment signaling complete opposition to the proposed rule. The most significant concern for most commenters was the proposed rule's deviation from the Panel's recommendations. Commenters pointed out the proposed rule's lower threshold to trigger competition of $10 million total contract value,[39] not limiting competitions to government owned facilities/properties, not limiting competition to once every ten years, and the lack of consideration of a social impact factor in the NPA selection decision for a competitive distribution.

There were several commenters who also stated concerns about potential job losses due to competition. These commenters stated that if price is included in the NPA selection process, NPAs will cut costs at the expense of employees who are blind and have significant disabilities. In fact, nearly all private individuals who responded to the NPRM are employed by NPAs and feared that increased competition might cause them to lose their job. The disability rights advocacy group that offered a comment during the interagency review period, voiced a similar concern.

D. Changes From the NPRM

Section II provides a detailed explanation of the scope of comments received and the changes made in response. In summary, the most significant changes are as follows:

- The threshold to trigger competition has been bifurcated. For DoD and its components, the threshold at which the Commission may consider a request for competition under this regulation will apply to projects valued at greater than $50 million. The threshold at which the Commission may consider a request for competition under this regulation by civilian agencies remains at greater than $10 million total project value in recognition of the lower base value of their contracts.[40]
- As recommended, the final rule now states that if a competitive distribution is approved by the Commission, the CNA shall not permit price to have greater weight than the non-price factors when making an NPA selection decision.
- The final rule does not adopt the term ''social impact,'' but, in response to NPA comments, it now directs the CNA to consider criteria or subcriteria related to training and placements, and employment opportunities for all competitive distribution decision approved in accordance with § 51–3.4(d).
- The final rule requires that a competition shall not be approved by the Commission due to failed good faith bilateral price negotiations (price impasse), until the parties have exhausted all administrative remedies required by the Commission's pricing policies and procedures. The final rule also limits those impasse related competitions to service requirements that exceed $1 million in total project value.
- The final rule clarifies that all requests for competition must come from a Federal agency Senior Executive or Flag or General Officer and must be approved by the Commission. The rule also explains that the Commission must, at a minimum, consider the criteria under § 51–2.4 before approving a competitive distribution.
- The final rule is reorganized, and terms are amended to ensure consistency throughout the rule, where appropriate.

II. Public Comments on the NPRM

The Commission carefully considered all of the comments related to this rulemaking. We summarized the commenters' views and, where appropriate, responded to all significant issues raised by the commenters that were within the scope of this rule. This means that we did not respond to every aspect of every comment. Instead, we focused on the most significant comments that related to the essential thrust of this rule; namely, use of a price component in the NPA selection process and the use of price competition for establishing the FMP. We also did not summarize or respond to comments that were administerial or outside the scope of the proposed rule. An analysis of the public comments received and of the changes in the regulations since publication of the NPRM follows.

A. Withdraw the NPRM and Replace It With an Advanced Notice of Proposed Rulemaking (ANPRM)

Comments: Several commenters requested that the Commission withdraw the NPRM and substitute it with an ANPRM and requested a public hearing to allow for greater dialogue, outreach, and a more detailed analysis on the costs, benefits, and alternatives to competition. Some who made similar comments to withdraw the NPRM also requested a public hearing to discuss the proposed rule further. Other commenters cited Executive Order (E.O.) 12866 which requires proactive engagement of interested or affected parties to inform the development of regulatory agendas and plans and stated that the Commission has not complied with the E.O. because there had not been adequate engagement with stakeholders.

Discussion: There is no requirement for a Federal agency to issue an ANPRM before a NPRM, especially when, as in this case, the agency's decision has been informed by the four-years of work conducted by a Congressionally mandated Panel and a 5-year Strategic Plan that specifically called for these changes.[41] The purpose of an ANPRM is to gauge the public's interest in a rule and to help the Federal agency decide if a new rule is necessary.[42] As noted earlier, the main reason for this rule change was to address the basis for the COFC's enjoinment to the Commission's interim policies and previous efforts to introduce competition into the

[38] There were 100 total comments received, but 5 were duplicates.

[39] The Panel recommended that new work to the program and re-competition for service contracts valued at $10 million or greater annually and performed on Federal installations/properties would automatically be competed, unless the requiring activity provided a compelling reason why competition is unnecessary.

[40] The term contract is replaced with project because the threshold is tied to a specific requirement on the PL rather than a contract with several requirements or one large project under multiple contracts.

[41] OIRA's website states an agency uses an ANPRM only when an agency believes it needs to gather more information before issuing an NPRM.

[42] *Id.*

Program.[43] As such, there was no doubt that the agency needed to amend its regulations to carry out the Panel's recommendations and the guidance set forth in the Commission's 5-year Strategic Plan. Nevertheless, it has been the practice of this agency to consider stakeholders' interests and to actively engage the public whenever there is a significant change to the way the Commission administers the Program.

For this rulemaking, the use of an NPRM provided a sufficient avenue for comment on the proposed changes. We initially granted 60 days to provide comment on the proposed rule. Subsequently, in response to requests for additional time, we provided an additional 30 days for public comment. Although the Commission did not hold a public hearing, members of the Commission staff attended conferences held by both CNAs to discuss the merits and challenges of introducing a price-inclusive competition into the Program. Additionally, the Commission routinely discussed this issue during public meetings and devoted the Commission's entire July 13, 2023, public meeting to listen to public concerns and support for the proposed rule. The issues raised during that public meeting largely mirrored comments received during the public comment period for the NPRM, but the engagement was useful for all involved. This is the type of engagement contemplated by E.O. 12866, fulfilled through actively listening to each stakeholder and making decisions informed by the interests of all involved.

Changes to the Rule: None.

B. Statutory & Rulemaking Authority

Comments: A few commenters stated the proposed rule goes beyond the scope of the JWOD Act. In particular, NPAs asserted that price competition is a departure from how Congress intended the Program to operate, creates potential negative incentives that could harm the mission of the Program and individuals it intends to serve, and criticized the lack of consultation with Congress in part due to a perception that the Commission has offered no methodology for which contracts would be eligible for competition.

Other commenters in support of the proposed rule disagreed and acknowledged there is nothing that prevents the AbilityOne Commission from approving FMPs resulting from price competition.

Discussion: The final regulation addresses many of the concerns raised by commenters regarding possible adverse impacts from the proposed rule. In addition, in establishing the Panel, Congress gave DoD broad authority to suspend compliance with the Program if the Commission did not substantially implement the recommendations of the Panel. Not implementing the recommendation, and risking DoD suspension, would be directly inconsistent with the purpose of the JWOD Act.[44] The authority to act on the Panel's recommendations, through regulation, has also been recognized by the COFC.[45] The court wrote that ''Congress granted AbilityOne formal rulemaking authority, which it can and has used to establish the procurement scheme it desires.'' It went on to write ''[g]ranted [the Commission] must submit its rules to formal notice-and-comment procedures but at the end of the day, AbilityOne likely has the rulemaking authority to craft procurement procedures that include a price component.'' [46] In issuing an NPRM, receiving and considering public comments, and publishing this final rule, the Commission has met its obligations under the statute and all applicable regulations.

Changes to the Rule: No substantive changes.

C. Differences From 898 Panel Recommendations

a. $10 Million Total Project Value Competition Threshold

Comments: Many commenters expressed opposition to the proposed rule's competition threshold of $10 million in total contract value instead of the Panel's recommendation of $10 million annual value. A few commenters noted that the Panel focused only on DoD procurements and that the proposed rule's lower threshold went far beyond the Panel's focus and recommendations. Of particular concern to many commenters is the increased number of eligible contracts for competition from 46 to 346 due to the lower threshold in the proposed rule. Commenters stated that participating in price competition is costly for NPAs and lowering the threshold exposes smaller NPAs to competition that may not have the ability to compete with larger NPAs. Commenters also argued that over time larger NPAs will dominate these competitive contracts, resulting in less competition among NPAs in the Program.

Largely, commenters recommended adopting the Panel's competition threshold of $10 million annual value, because as one CNA stated, ''the 898 Panel struck the correct compromise in providing an opportunity for competition on the largest contracts with the greatest opportunity for savings.'' Alternatively, one NPA recommended a $15 million threshold for existing contracts to further protect small NPAs, while another commenter recommended the Commission consider adding an escalation rate to the contract value that aligns with required minimum wage increase requirements for Federal contractors under the Executive Order 14026.

The Commission also received comments in support of the proposed rule's $10 million total contract value threshold for competition. One commenter, for example pointed out that the Panel's recommended price competition threshold was mandatory and did not meet civilian Federal customer needs. The same commenter praised the Commission's decision to make competition discretionary as opposed to mandatory. Another supportive commenter believed the proposed rule would create new opportunities for other NPAs in the Program, thereby creating more jobs for individuals who are blind or have significant disabilities.

Discussion: Although it is generally true the Panel sought to create a policy that targeted service requirements valued at $10 million or greater annually, it did not foreclose the possibility of competing requirements under that threshold. On February 2020, Subcommittee Six established a policy working group to develop the proposed framework for executing the NPA selection process.[47] This included, but was not limited to, establishing business rules for competition and assignment of work among AbilityOne Program NPAs. The policy working group compiled its final analysis and completed a draft policy shortly before the Panel's sunset in January 2022.[48] The draft policy

[43] *Supra* note 9.

[44] *Supra* note 1 at (g)(1)(A).

[45] *See* 41 U.S.C. 8503(d)(1). The JWOD Act gives the Commission explicit and the sole authority to ''maintain and publish'' a PL. The Act further states that the Commission ''may prescribe regulations . . . as necessary to carry out this chapter.''

[46] *See also supra* note 9 at pp. 17–18.

[47] Third Annual Report to Congress, p. 33. at *https://www.acq.osd.mil/asda/dpc/cp/policy/docs/a1/Third_Annual_Report_to_Congress_(Signed_by_the_OUSD_AS_February_4,_2021).pdf* Third Panel Report to Congress, p. 33. *https://www.acq.osd.mil/asda/dpc/cp/policy/docs/a1/Third_Annual_Report_to_Congress_(Signed_by_the_OUSD_AS_February_4_2021).pdf.*

[48] *See* Fourth Panel Report to Congress, p. 29. The report refers to the draft policy that the Panel would provide to support the Commission's regulatory update. *https://www.acq.osd.mil/asda/dpc/cp/policy/docs/a1/4%20-%20Fourth%20and*

Continued

expressly stated that competition ''automatically applied to new and existing Procurement List actions for services estimated to exceed $10 million annually.'' [49] The policy also permitted the Commission, through written vote, to allow competition for ''new and existing PL actions for services with an estimated value less than $10 million.'' [50] In essence, the Panel's intention was to make competition *mandatory* for all requirements greater than $10 million annually, but discretionary for *any* service requirement below the threshold. In contrast, the threshold described in the NPRM is fully discretionary and limited to those requirements with a total contract value of $10 million or greater, except in the case of a price impasse. Both the Commission's NPRM and final rule threshold are more targeted and ultimately less expansive than the Panel's and Subcommittee Six's intended competition framework, subjecting far fewer service requirements to potential competition.

In setting the $10 million threshold, the Commission sought to make the Program more responsive to civilian Federal agencies. This decision was based on balancing the needs of civilian federal agencies and providing some measure of predictability to service-providing NPAs. For example, in SourceAmerica's 2022 Federal Customer Survey Final Report, the surveyed Federal customers reported an average 86% overall Program satisfaction rate for the five survey periods referenced in the report.[51] Over the same period, however, approximately 40.5% of surveyed Federal customers reported that the Program's products and services were overpriced when compared to other non-AbilityOne contractors.[52] Additionally, 25% of the surveyed customers reported it was unlikely they would pursue new contract opportunities through the AbilityOne Program, and 30% of the surveyed customers responded they were unlikely to expand current contracts with the Program.[53] When asked what ways the Program could be improved, several survey participants mentioned pricing, noting that ''similar services with non-NPAs are much less expensive.'' [54] The surveyed customers recommended the Commission provide for competition between NPAs, because the ability for Federal customers to compare market prices is not possible when they are compelled to negotiate price with one vendor.[55] Comments, recommendations, and survey results like this have led the Commission to conclude that the desire for competition was not limited to the DoD and its instrumentalities, thereby supporting a need for a lower requesting threshold for civilian Federal agencies. Therefore, in addition to the final rule incorporating the work of the Panel, the Commission determined that it was prudent to retain a threshold low enough to be responsive to the concerns and needs of civilian Federal agencies, but not so low that every or most requirements could be subject to the type of competition described in this rulemaking.

Changes to the Rule: The final rule bifurcates the thresholds to trigger competition eligibility for non-DoD Federal agencies and the DoD. The threshold will remain at $10 million total project value for the former but increased to $50 million total project value for the DoD and its components. The Commission also notes that the term ''contract'' has been replaced with the word ''project,'' because the threshold is tied to a specific requirement identified on the PL, rather than the value of a contract which could contain several requirements under a single contract, or one large project issued under multiple contracts.

b. Frequency of Competition

Comments: Commenters expressed concern over how often contracts would be recompeted, stating that competing contracts too often creates instability and administrative burden. Many commenters recommended adding a provision that a contract could not be recompeted for a 10-year period. Commenters stated longer contract periods allow the NPAs to extend major purchases over a longer period which provides cost savings to the Federal customer. One commenter also stated that recompeting too often potentially makes it harder to partner with commercial partners who are attracted to long-term contracts, especially at a time when the Commission has expressed interest in increasing partnering and subcontracting opportunities to expand competitive employment options. Some commenters also noted that routine competitions provide less incentives for NPAs to make major investments, because the NPA may not recoup the cost of those investments if it loses the order after the period of performance ends.

Discussion: After an initial competitive distribution has been completed, there would be little basis for the Commission to authorize another competition five years later, unless there are persistent concern(s) that had not been addressed from the last competition or new problems emerge. Although there is nothing in the rule to preclude a Federal agency from requesting competition every time a contract is up for renewal, it is highly unlikely that the Commission would approve routine requests for the same requirement. The Commission expects most Federal customers to be highly satisfied with their AbilityOne contractors and to prefer awarding sole source contracts as permitted by 10 U.S.C. 3204(a)(5) or 41 U.S.C. 3304(a)(5). Furthermore, Commission regulations already encourage agencies to ''to use the longest contract term available by law . . . in order to minimize the time and expense devoted to formation and renewal of these contracts.'' 41 CFR 51–6.3. The Commission will continue to promote the use of long-term agreements, especially where it provides lower administrative expenses for the Federal government and the service providing NPA.

As noted previously, the Fort Knox pilot was identified and executed after senior leader coordination and approval from the Army and the AbilityOne Commission. This approach ensured excellent lines of communication and robust responsiveness from the early stages of requirement development to NPA selection and contract award. Once this rule is finalized, similar coordination, collaboration, and approval will be a critical component for implementing this rule. The Commission also believes that senior level coordination will help to mitigate the frequency of competition, by requiring request to be vetted by the requesting Federal agency at least one level above the user level prior to submission to the Commission.

Changes to the Rule: The Commission has revised the final rule at § 51–3.4(b) to clarify that a request for competition must come from members of the Senior Executive Service or Flag or General Officers in acquiring Federal agencies

(Dec%202021).pdf#page=29.

[49] Draft Policy 51.303 is on file with the agency and available on the agency's website at FOIA Reading Room. In addition to the automatic competition trigger for requirements greater than $10 million annually, the policy permitted the Commission's executive director to waive a mandatory competition through a written request to the Commission from the CNA with concurrence from the Federal customer.

[50] *Id.*

[51] Source America Federal Customer Survey on file with agency. The report covered surveys conducted in 2014, 2016, 2018, 2020, and 2022. The numbers used in this rule represents the average over that period.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

and require approval from the Commission.

c. A Factor for Social Impact

Comments: A significant number of commenters expressed concern that the proposed rule did not adopt the Panel's recommendation to include social impact as a factor for selecting an NPA. The commenters stated that omission of social impact in the proposed rule meant it would not be a factor in the competition process of selecting an NPA and that this would lead to a race to the lowest price at the expense of the mission of the Program. In large part, these commenters suggested that the Commission adopt the Panel's recommendation and make clear in the final rule that the best value trade-off includes an analysis of social impact in the final selection of an NPA to provide the requirement.

Some commenters also recommended adding explicit weighting criteria for each factor, with a handful of commenters requesting that social impact be the most heavily weighted factor and price be the least heavily weighted factor. Other commenters recommended prioritizing all non-price factors above price but did not recommend that social impact be the most heavily weighted factor. The purpose of these approaches, as described by the commenters, was to protect the Program's mission of employing individuals who are blind or have significant disabilities and ensuring that actions by NPAs to provide career development for employees were taken into account as a positive factor.

Additionally, multiple commenters recommended that the social impact include consideration of such things as maximizing job opportunities for individuals who are blind or have significant disabilities, direct labor ratios, NPA size, Quality Work Environment (QWE) certification, mentorship programs, teaming opportunities, and quality of employment. Other commenters suggested alternative criteria that should be considered under social impact, specifically, retention of employees who previously earned subminimum wage and potential disruption to the current workforce if there was a change in the NPA selected for the project. Other social impact factors recommended for consideration included the creation of impact-oriented safeguards to protect AbilityOne employees, such as no loss of seniority, no benefit changes, transportation to and from the job site, and preservation of career ladders and upward mobility.

Discussion: The term ''social impact'' is not used in the AbilityOne Program. It is an umbrella term created by Subcommittee Six to account for various Program-specific priorities described as follows:

> The results of the new proposed process will maximize competition within the Program and ensure equitable selection and allocation of work. This includes maximizing job opportunities for persons with disabilities, including veterans with disabilities, through the Social Impact proposal that will identify participation levels for these individuals. It will also consider the size of the NPA, mentorship programs, teaming opportunities, contributions to the community, and the quality of the employment of individuals with disabilities.[56]

The Commission considered using the term ''social impact'' and creating a definition but concluded that even if it were to do so, social impact is a broad idea that might mean many different things to the different members of the Federal acquisition community as well as other Program stakeholders. The Federal Acquisition Regulation (FAR) lists guiding principles for the Federal Acquisition System (FAR 1.102). One of these guiding principles is fulfilling public policy objectives. Nearly every single public policy objective is about having a positive social impact.

As examples, Federal acquisition seeks a social impact in promoting economic resiliency through the Buy America Act, Trade Agreements Act, and local purchasing during major disasters under the Stafford Act. Another set of public policy objectives with a social impact are in the sustainable purchasing space. Examples include Bio-based purchasing through USDA and EPA's Comprehensive Procurement Guidelines. Federal acquisition seeks a social impact in supporting small businesses and underserved socio-economic communities through a host of efforts including set-asides for small, disadvantaged, woman-owned small businesses, purchases to service-disabled veteran-owned small businesses, etc. There are many more examples. Out of concern that it is too broad of an umbrella term which would never be understood, the Commission did not adopt or attempt to define the term social impact.

However, a clearly stated social policy objective of the Program is to increase training, employment and placement opportunities for individuals who are blind or have other severe disabilities through the purchase of commodities and services from qualified nonprofit agencies employing persons who are blind or have other severe disabilities. 41 CFR 51–1.1. Strategic Objective II of the Commission's Strategic Plan for FY 2022–2026 reinforces this policy objective by seeking an increase in the number of ''good jobs'' and ''optimal jobs,'' as defined in the Strategic Plan, throughout the Program.[57] The Commission's work on updating its compliance policies, following issuance of the Strategic Plan, further solidified the Commission's commitment to enhancing the employment aspects of the Program. For example, in November 2023, the Commission finalized Commission Policy 51.400, which introduced the long-term objective of providing job individualizations, employee career plans, and career advancement programs.[58]

Until the Commission updates its regulations with terminology addressing the activities described above,[59] the Commission has determined that the most appropriate way to promote these types of activities is to use existing regulatory language regarding training and placements opportunities.[60] The rule makes clear that the Commission will approve criteria or subcriteria in support of these types of opportunities.

The final rule also requires that the selection official consider criteria or subcriteria related to employment opportunities for each competitive distribution.[61] This addresses the concern of many commenters that price competition between NPAs might reduce the number of individuals who are blind or have significant disabilities who are hired or may result in the substitution of employees whose disabilities are not as significant as those of other employees.

Finally, the rule makes clear that an NPA's capacity to create good and

[56] *Supra* note 47, page 32.

[57] *See supra* note 14.

[58] *www.abilityone.gov/laws,_regulations_and_policy/documents/Commission%20Policy%2051.400%20AbilityOne%20Commission%20Compliance%20Program%20-%20Jan%201,%202024%20-%20signed%20-%20508.pdf.*

[59] The Commission's Regulatory Agenda anticipates an update of regulation § 51–2.4 regarding suitability criteria. Amendments to the regulation are likely to include enumerated workforce development elements or broadly require adherence to Commission policies on employee training and career development initiatives. *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=3037-AA21.*

[60] The rewording emphasizes the policy goal of the Federal government described at Commission regulations 41 CFR 51–1.1. It also makes explicit reference to an NPA's responsibility to maintain an ongoing placement program under Commission regulation 41 CFR 51–4.3(b)(8).

[61] *Id.*

optimal jobs will be taken into account early in the competition process as well. If the Commission decides that a competitive distribution is appropriate, it will authorize at least two nonprofit agencies to serve as mandatory sources. In determining these authorizations, the Commission will apply the suitability criteria described at § 51–2.4. As the Commission made clear during the July 2023 public meeting, the ''special considerations'' referenced in Commission Policy 51.301 may include an NPA's record and capability in providing elements of employee training and career development. Indeed, these factors were considered during the Fort Knox pilot project.

Changes to the Rule: The final rule now directs the CNA to consider the capability of the NPA to provide training and placement, as well as employment opportunities, in making the selection decision. The rule also explains that the Commission must consider the criteria under § 51–2.4 before approving a competitive distribution and authorizing NPAs for the distribution.

d. Limiting Competition To Work Performed on Federal Property

Comments: Several commenters recommended adopting the Panel's recommendation that competition be limited to work performed on Federal property or at government owned facilities. Commenters raised the concern that the proposed rule did not consider the significant investment in infrastructure required when services are performed at an NPA location and are not portable or easily moved to another NPA location without significant unfavorable consequences.

Discussion: The Commission is aware that many NPAs have made significant investments in equipment, supplies, facilities, and personnel to perform work at NPA-owned or NPA-leased facilities. That was the principal reason this rule excludes products, because of the significant capital investments required to start and maintain a production line.

The Commission believes some of the future growth of the Program will come in knowledge-based jobs or in other jobs which can be performed remotely. Limiting this regulation to jobs which will be performed from a Government facility does not reflect the changing nature of many jobs.

Changes to the Rule: None.

D. Concerns About Price Being a Dominant Factor in Making the NPA Selection Decision

Comments: Several commenters expressed concern that there is nothing in the proposed rule that would prevent a requirement from simply going to the NPA offering the lowest price and that approach would lead to a ''race to the bottom.'' NPAs were concerned that if price becomes the deciding factor or the sole differentiator among technically capable bidders, the results of a competition could cause irreparable harm to the Program and the individuals who depend on it for support.

Other commenters raised similar concerns, such as stating that the proposed rule promoted price competition alone without considering other factors such as accommodating disabilities, productivity levels, costs of workforce integration and empowering individuals with disabilities, and costs of transitioning employees with disabilities into the private sector.

Commenters recommended a variety of guardrails to reduce the possibility of Lowest Price Technically Acceptable (LPTA) determinations. These recommendations included: requiring the Federal customer and incumbent NPA to engage in good faith bilateral negotiations prior to requesting price competition, not allowing re-competition if quality of service is not a factor, incorporating a best value tradeoff social impact criterion, and including language in the proposed rule that addresses when the LPTA is acceptable, similar to language in the FAR.[62]

Discussion: To address the concerns raised by commenters, the Commission has added language in the final rule to ensure that price will not have greater weight than the non-price factors for competitive distributions. It should also be noted that limiting the weight that price might have in a competitive distribution is a departure from the Panel's recommendation. The Panel left open the possibility of price having equal weight than the non-price factors. However, the final rule departs from this recommendation, which will serve as a signal to the NPA community and Federal agencies that price can be ''a'' factor, but it must be subordinate to the non-price factors for NPA selection. Lastly, but most importantly, nothing in this rulemaking is intended to supplant the Commission's statutory authority and responsibility to set the FMP.[63] For instance, if the Commission determines that the price resulting from a competition is dangerously low or out of synch with other Commission priorities, it retains the authority to adjust the final price or allow for additional price protections as necessary.

Changes to the Rule: Under § 51–3.4(d), the final rule now states that if a competitive distribution is approved by the Commission, the CNA shall not permit price to have greater weight than the non-price factors (combined) when making an NPA selection decision.

E. Job Losses

Comments: Several commenters were concerned about the downward effect of price competition on jobs in the Program, fearing individuals who are blind or have significant disabilities would be negatively impacted by the reduction of labor positions in response to their NPA providing competitive pricing. One of the CNAs argued that the proposed rule touted the benefits of competition without addressing the potential impact on employees with disabilities and that ''increased competition may force NPAs to evaluate who they can hire to support lower contract costs and greater efficiency.'' Several NPAs similarly stated that price competition incentivizes NPAs to focus on achieving the lowest price by hiring the most efficient workers with less significant disabilities, subcontracting out work, hiring on a part-time basis rather than employing individuals with the most significant disabilities, or transitioning individuals who are blind or have significant disabilities into employment outside of the Program. A few commenters also expressed concern about competition causing consolidation of NPAs which could also negatively impact jobs for individuals with disabilities. Two commenters requested there be a post-final-rule study on the impact on job loss for individuals with disabilities.

Discussion: The rule changes described in this rulemaking open the potential for attracting new and emerging jobs from Federal agencies. The changes also contain a number of protections to ensure a robust review before any competitions are accepted, discussed above. Finally, the rule now includes a requirement that the CNA consider training, placements, and employment opportunities in making the selection decision.

Changes to the Rule: The final rule directs the CNA to consider NPA capability of providing training, placements, and placement, as well as employment opportunity, as criteria or subcriteria for each NPA selection decision. In addition, as discussed

[62] *See* FAR 15.101–2(c).

[63] 41 U.S.C. 8503(b).

above, the changes ensure a robust review before requests for competition are accepted.

F. Directed Competition Due to Price Impasse

Comments: Several commenters disagreed with the provision allowing competition due to a price impasse. A primary concern voiced was that it gives the Federal customer little to no reason to avert impasse and as one NPA argued ''any contract could be approved for competition under the proposed rule . . . effectively opening the door for any government customer to prefer impasse as a means to render the contract eligible for competition.'' Commenters also expressed concern about the lack of criteria for when price competition would be directed and that the mere threat of competition would cause NPAs to accept prices below fair market value to the detriment of the NPA and employees. Many commenters that opposed the provision asked the Commission to remove the option from the proposed rule and leave the current impasse procedures in place.

Conversely, two commenters in support of the provision requested the price impasse provision only apply when other conditions are satisfied such as limiting it to contracts valued at $10 million annually and services operating on government-owned sites/facilities.

Discussion: During fiscal year 2023, the Commission oversaw the resolution of three price disputes between an NPA and a Federal agency using the Commission's current price impasse procedures. None of those impasse actions were for service contracts.[64] This is consistent with the annual average of two to three price impasse decisions over the last five years. The Commission does not expect the number of impasses to increase because of this rule change, since Federal agencies will still be required to exhaust the Commission's existing administrative procedures before a competitive option is considered. Even then, a competitive distribution would only be directed for requirements exceeding $1 million in total project value and when other methods for resolving a price impasse have proven ineffective.

Changes to the Rule: We have modified and reorganized § 51–3.4. First, we moved the impasse provision in the final rule from paragraph (c) to (e). We also added language clarifying that the Commission shall not direct a competition because of a price impasse until bilateral price negotiations consistent with § 51–2.7(b) are attempted in good faith, and that a Federal agency may not request competition until the parties have exhausted all administrative remedies required by the Commission's pricing policies and procedures. Lastly, we added language to the final rule that limits those impasse related competitions to service requirements that exceed $1 million in total project value.

G. Competition Will Drive Up NPA Costs

Comments: Several commenters expressed concern that the proposed rule did not include an adequate cost benefit analysis to the NPA community. Commenters largely argued that the proposed rule underestimated the costs to the NPA network to prepare bids, the cost to the Program for competition and re-competition, and the costs of stranded assets and trying to recapture those costs over a 5-year period. They further argued that the money to prepare the bids and proposals to compete would take funds away from NPAs spending to support their social mission.

Commenters argued the proposed rule did not adequately consider the impact and interaction with other simultaneous changes in the Program's policies and the new requirements upon NPAs that may impose additional costs. These commenters expressed concern that the proposed rule did not address the impact on an incumbent NPA, particularly when the NPA loses a contract that makes up a significant portion of the NPA's total revenue and the impact on subcontracting NPAs if the incumbent loses the contract.

A few commenters recommended the Commission evaluate using the Program Fee collected by the CNAs to mitigate the costs for the NPAs, with one commenter specifically recommending that the responsible CNA share in the increased cost burden by modifying the fees collected when competition occurs to help mitigate costs, while another commenter recommended eliminating the CNA Program Fee after the fifth year of a service contract on contracts valued at more than $10 million.

Discussion: The cost to prepare a response to an Opportunity Notice (proposal) may not be an insignificant matter for a competitive distribution. However, the Commission has, on balance, determined that any additional costs associated with competition are offset by the potential cost savings benefit Federal Government and the ability to attract new work performed by employees who are blind or have significant disabilities and retain existing requirements in the Program.

If an incumbent NPA is displaced by a competitive distribution, such displacement would result in a net loss to the outgoing NPA, but not to the Program. In addition, as noted throughout, Federal agencies may request a competitive distribution, but it will ultimately be up to the Commission to decide whether competition will occur. Commission discretion coupled with the relative infrequency of competitions, should result in an overall net gain for the Program and the ordering agency. Simply put, competitions will not be approved simply for the sake of competing, but when the overall benefits of competing reasonably outweigh other options.

Lastly, the Commission will continue to study the results of previous and future pilots, to best gauge how to offset unnecessary cost burdens associated with competition. However, comments related to mitigating cost through changes in CNA Program Fees is beyond the scope of this rulemaking.

With regard to the impact and interaction between this rule and other simultaneous changes in the Program's policies, the final rule requires the CNA to consider the NPA's activities in making some of these changes.

Changes to the Rule: The Commission has revised the final rule language at § 51–3.4(d) to limit frequency of competition through an approval process and inclusion of NPA capability regarding training and placements, as well as employment opportunities.

H. Criticisms of Pilots & Cost-Savings Projections

Comments: Several commenters claimed that the cost savings achieved by the pilots were exaggerated, costs to workers were ignored, and the results of two pilots were not sufficient information on which to base long-term changes to the Program. These commenters argued that cost savings and results did not capture or include the effect competition had on the incumbent NPA's retention of jobs or availability of training. One commenter noted that the pilot at Fort Bliss cost 60 jobs for people with significant disabilities and the curtailment of social impact support services and other programs designed to benefit the workforce.

Additionally, a few commenters contended that the discussion of the pilot savings was misleading and that the existing performance work statements (PWSs) and contractual

[64] There was one service requirement referred to the Commission for a price impasse decision, but the request for impasse was withdrawn before the Commission rendered a decision.

vehicles were significantly different from the original PWS and contracts issued in the competition. Commenters claimed these scope reductions and other substantial changes lowered the price regardless of price competition. Other commenters argued the blocked Fort Meade pilot resulted in bilateral negotiations which saved the Federal customer more money than the projected pilot savings.

Discussion: Like any complex Government requirement in which there are almost always changes from one year to the next, we agree that there were changes made to the PWSs for the pilot test requirements. Such changes are especially likely when the Government restructures a follow-on contract from the prior effort. Some commenters have asserted that changes to the requirement, rather than the impact of a price-inclusive NPA selection, are the reason for the cost savings from the pilots described in the NPRM. We disagree with this characterization. The Commission believes the best measure for the savings achieved with the pilots is seen when the price of the successful (or would be successful) NPA is compared to the Independent Government Cost Estimate (IGCE) and the proposed prices of the other NPAs involved in the competition.[65] When compared to the IGCE, the cost savings for Fort Bliss were approximately 12.7 percent. The NPRM stated that the cost savings were 12 percent. For Fort Meade, the savings were 14 percent when compared to the IGCE. The NPRM erroneously stated the cost savings were 17 percent, but the NPRM correctly stated the applicable totals; namely, $19.6 million estimated annual contract value compared to the $16.8 million annual contract value offered by NPA 4 (14 percent).

Under an IGSA, the DoD already has authority to use an alternative to the AbilityOne Program. Ensuring the DoD has a means to give it confidence that its use of the AbilityOne Program will result in good service at a fair market price is critical to ensuring the DoD's future use of the Program. The true benefit of the competition process, regardless of cost savings, was the requirement remained with AbilityOne.

Another point raised by some commenters was the claim that the price-inclusive competition at Fort Bliss caused 60 workers with significant disabilities to lose employment. The Commission rejects this assertion. First, the same commenter noted that the cost savings at Fort Bliss were the result of reductions in the scope of the requirement. As noted above, every contract undergoes changes in scope from one contract period of performance to the next. Sometimes the scope of work increases, and the contractor will need to employ a larger workforce to accomplish the mission. On other occasions, the scope is reduced, necessitating a reduction in the number of workers performing on the contract. In any event, if the loss in jobs was the result of a reduction in scope (*i.e.,* less work) the loss in jobs cannot be attributed to the competition. In fact, another commenter noted that it was able to achieve greater cost savings for the Federal agency through bilateral negotiations, but the commenter did not indicate that those cost savings adversely impacted AbilityOne employees.

Second, the Fort Bliss competitive pilot concluded in 2019.[66] Since that time, the entire nation experienced one of the most life-altering events in the history of the world—the COVID–19 pandemic. The pandemic not only caused a reduction in certain service requirements across the Federal Government, but many employees, those with and without disabilities, were fearful about returning to work. The pandemic caused unprecedented job losses across the country and employers in the AbilityOne Program and throughout the nation have struggled to bring employment levels back up to pre-pandemic levels. As such, it does not follow that every worker that is no longer working at Fort Bliss (or elsewhere) is not working because of the competition pilot in 2019.[67] There are numerous reasons impacting employee participation in the workforce, and employees in the AbilityOne Program are no exception.[68] In fact, the Commission authorized the selected NPA for the Fort Knox pilot to operate at a lower project level ratio not only to encourage the creation of integrated work environments, but to also address the challenges NPAs are experiencing in recruiting qualified personnel with disabilities in the current job market.[69]

Lastly, although it is permissible to use profits from an AbilityOne contract to finance social endeavors to support employees who are blind or have significant disabilities, it is generally not permissible to treat such costs as directly chargeable to the Government. With that said, the Commission does not dictate to an NPA how it should use its net proceeds. However, an NPA's decision to discontinue or reduce workforce development activities for workers who are blind or have significant disabilities will have a detrimental effect on its ability to compete for AbilityOne work in the future.

Changes to the Rule: None.

I. Right of First Refusal

Comments: A few commenters commended the Commission for protecting the jobs of employees who are blind or have significant disabilities by including a right of first refusal. However, other commenters raised concerns that this provision was not sufficient to protect employees. Commenters argued that even with this provision, there is concern that employees will lose their jobs due to pressure to reduce operating costs. Additional concerns were raised such as the same vocational supports the employee received not being available from the successful contractor, the disruptive nature of changing employers for some employees, and the NPA not having the primary opportunity to retain the employee.

These commenters asked that the rule include how these individuals will be supported, as well as specifications and funding for appropriate assistance and training to help displaced individuals with disabilities find new employment opportunities. Commenters also made recommendations that included using Executive Order 14055 Nondisplacement of Qualified Workers Under Service Contracts as a guide and revising the proposed rule to include

[65] One commenter noted that the new PWS for the Fort Bliss FSOS eliminated two requirements that were required under the predecessor effort (*i.e.,* service order desk and reduced reporting requirements). These requirements were not priced into the IGCE, because the IGCE was based off of the revised PWS, not the incumbent contract.

[66] Report on the 2018–2019 Competition Pilot Test for AbilityOne Program Nonprofit Agencies Facility Support and Operations Services Contract Fort Bliss, Texas. *AbilityOne Commission Report on Competition Pilot Test at Fort Bliss, Texas 2018–2019.*

[67] *See* U.S. Bureau of Labor Statistics article at *https://www.bls.gov/opub/mlr/2021/article/covid-19-ends-longest-employment-expansion-in-ces-history.htm.* The article states that ''[a]ccording to data from the U.S. Bureau of Labor Statistics (BLS) Current Employment Statistics (CES) survey, nonfarm payroll employment in the United States declined by 9.4 million in 2020, the largest calendar-year decline in the history of the CES employment series.''

[68] *See* U.S. Department of Commerce report at *https://www.uschamber.com/workforce/understanding-americas-labor-shortage.* The report states, ''[r]ight now, the labor force participation rate is 62.7%, down from 63.3% in February 2020. There's not just one reason that workers are sitting out, but several factors have come together to cause the ongoing shortage.''

[69] *See Id.* The report notes that ''[r]ight now, the latest data shows that we have 9.5 million job openings in the U.S., but only 6.5 million unemployed workers.''

specifications and funding for the provision of appropriate assistance and training to help displaced individuals with disabilities find new employment opportunities. One commenter suggested expansion of the right of first refusal provision to all projects on the PL regardless of project type. In contrast, another commenter recommended applying proposed § 51–5.1(f) to only service contracts, while another commenter recommended including a requirement that the employee only have the right of refusal if the employee decided to move to the new NPA and/or the losing NPA does not have an equal or better opportunity for continued employment for that individual.

Discussion: The right of first refusal is not limited to those authorizations where the change in NPA is the result of a competitive distribution. Any instance where an NPA is replaced by another NPA would trigger a participating employee's right of first refusal (for products or services). Although providing employee accommodations and supports are beyond the scope of this rule, there are other Commission policies and procedures aimed to ensure that there is standardized level of support NPAs are expected to provide to their AbilityOne workforce. This means that once a new NPA assumes responsibility for the existing workforce of an AbilityOne requirement it should be just as conscientious in supporting its inherited workforce as the incumbent. However, the Commission does recognize that there may be some instances where some NPAs are better at providing specific types of support to a given workforce than another. There is nothing in this rule that would preclude an incumbent NPA from offering an individual another job to retain his or services with its NPA. However, the right of first refusal is an employee's right that they may choose to exercise if they do not choose to seek other opportunities elsewhere.

Lastly, this regulatory change is designed to work in concert with Executive Order 14055 or any other Executive Order or rule aimed at protecting an incumbent workforce. The significance of this rule is that it directs NPAs to prioritize incumbent workers who are blind or have significant disabilities over all others when the work is being performed under a PL requirement. Although the potential funding needs of individual employees are beyond the scope of this rulemaking, the Commission will continue to collect and review data to determine if there is an unmet workforce need that might require additional funding to rectify.

Changes to the Rule: None.

J. Strain on Commission and CNA Resources

Comments: Several commenters expressed concern that the Commission and CNAs do not have the resources or the staff to handle the potential volume of competitions with a lower threshold and re-competitions due to the price impasse provision. Commenters also argued that the proposed rule lacked sufficient guardrails to limit the number of competitions to protect Commission and CNA resources. One commenter argued that the Commission and CNA do not have the expertise to conduct price competitions. This commenter recommended the procuring Federal agencies should be delegated authority to conduct the price competition, like the Small Business Act (SBA) competitive 8(a) Program at FAR 19.800, and that the Commission or CNAs should only provide the ''pool'' of qualified NPA candidates. One commenter recommended identifying and approving new distributions at least 24 months out so that the Commission, CNAs, and NPAs would have enough lead time to plan and execute.

Another commenter argued that while the NPRM stated that price competition would only be utilized in complex projects or cases that had unique requirements, the history of the pilot projects suggests that price competition is not intended for a select few items on the PL and that price competition is likely to be broadly applied and overwhelm Commission resources.

Discussion: Approving and managing competitive distributions, especially for existing requirements, may increase the workload for CNA and Commission staff. This means that the process for implementing changes will need to be done in a deliberate manner from initial approval to execution. The Commission currently has an existing framework for identifying and granting approval for complex projects. Complex projects must generally be identified and approved 24 months before project execution. A similar approach could be used for identifying and approving candidates for competition.

It is true that the Fort Bliss and Fort Meade pilots created additional workload for the Commission staff. The Fort Knox pilot was significantly less burdensome for Commission staff, but in turn required more work from the CNAs and the Federal customer in terms of overall management and evaluative support. Both CNAs have indicated that this additional workload would not come without cost in terms of time and other resources. The Commission recognizes planning will be important, as well as deliberate coordination with CNAs and Federal agencies desirous of pursuing a price-inclusive competitive option. The Federal customer provided expertise in pricing and technical support for all three pilots. When the final rule is implemented, the Federal customer will be expected to provide similar support. Lastly, the Commission believes the fact that approval of a competitive distribution is discretionary will allow the Commission to manage the workload of the number of requests approved on an annual basis.

Changes to the Rule: The Commission revised § 51–3.4(b) to clarify that requests for competition must come from members of the Senior Executive Service or Flag or General Officers in acquiring Federal agencies and that the Commission determines whether to approve the request. Availability of resources to conduct the competition is appropriately part of the decision process.

K. Alternative Methods to Price Competition

Comments: Several commenters recommended the Commission consider alternative methods to price competition to address the Federal customers' needs.

These same commenters provided the following alternatives to competition: analysis of supply schedules, approved indirect rate or a safe harbor based on the audit with a default rate, pricing methodologies that account for accommodations, use of FAR 15.404–1(b)(2) which includes guidance on factors to consider in determining ''fair and reasonable'' price outside of competition and which lists price analysis techniques, and use of an AbilityOne Supply Schedule. Additional recommendations included modernizing the Commission's and CNA's pricing methods and processes, training NPAs and contracting officers in best practices for bilateral negotiations and using the Contractor Performance Assessment Reporting System (CPARS) to improve contractor performance. One commenter noted that all agencies are exempt from the use of CPARS except DoD and suggested this exemption should be removed and thoroughly explored before engaging in re-competition.

Alternatively, another commenter suggested, rather than using price competition to establish the FMP, the Commission should improve the price impasse process. In addition to similar recommendations as above, the

commenter recommended strict time limits to prevent years-long impasses and a single appeal process where the Commission decides the price. The NPA would then accept the price or pass on the opportunity, and a competitive process that excludes price competition between NPAs would occur to replace the NPA. Another commenter stated that if the Commission's concerns about price relate to overhead and general and administrative (G&A) rates, then mechanisms already existed to control these concerns such as adding audited/accepted/certified indirect rates.

In contrast, one NPA proposed a procedure to address price or performance concerns not in lieu of competition, but as a prerequisite before the Commission would authorize a re-competition. This recommended process would require the contracting officer to submit a formal request to the Commission for a review at the mid-point of the contract period and the Federal customer would either document specific shortcomings for performance-based concerns or provide an IGCE or other price analysis for price-based concerns. The Commission would then authorize the CNA to conduct an independent pricing analysis or best practices assessment and conduct sessions with the Federal customer and NPA to address concerns with the NPA, submitting a plan to address these concerns. Only then would the Commission have the option to authorize a re-competition.

Discussion: The inclusion of price competition at § 51–2.7 as a tool for establishing the fair market price is just one option of the numerous options already available to the Commission. In fact, the most significant change in this rulemaking is to clarify the pricing tools available to the Commission. The Commission's current procedures encourage bilateral price negotiations between the NPA and contracting agency to establish price reasonableness. Currently, the Commission relies almost exclusively on these negotiations. The existing regulation also stated that other methodologies can be used, ''if agreed to by the negotiating parties.'' In interpreting this provision, the COFC found that, absent a change in the regulation, the Commission cannot consider other methodologies unless the NPA and contracting activity also agree.[70] The changes to § 51–2.7 eliminate this ambiguity and clarify the statutory authority of the Commission. The larger point here is that the changes proposed in this rulemaking provide the Commission with the flexibility to use price competition, in concert with other methodologies, for distribution decisions covered under this section.

Changes to the Rule: None.

L. Fair and Equitable

Comments: A small number of commenters also took issue with the removal of the phrase ''fair and equitable'' from § 51.3–4 in the proposed rule, believing that the removal meant prioritizing the needs of the requesting Federal agency would come at the expense of the NPA's equity interest.

Discussion: In most instances, only one NPA will be authorized to provide a good or service, based on the Commission's public policy objectives at the time a requirement is added to the PL. When a competition is requested, the CNA will still be expected to make recommendation decisions in a manner that is ''fair and equitable'' to the NPAs responding to the Opportunity Notice. For instance, there may be times when it might be advantageous to limit an Opportunity Notice to NPAs of a specific size, geographical area, or other special considerations approved by the Commission. Once a recommendation is made, the Commission will also consider the equity interest of each NPA when making an authorization decision. Again, in most instances the Commission will only be authorizing a single NPA to serve as a mandatory source. The change in language at § 51–3.4 was only meant to distinguish how CNAs will distribute orders when more than one NPA is authorized. However, for clarity, the Commission is adopting this comment and retaining the ''fair and equitable'' language from the existing § 51–3.4 into § 51–3.4(a) of the final rule.

Changes to the Rule: The Commission has moved ''fair and equitable'' language from the existing § 51–3.4 into § 51–3.4(a) of the final rule and makes clear that the distribution will also provide the best value for the requiring Federal agency and for the mission of the Program.

M. Deauthorization of an NPA

Comments: Some commenters took issue with the change in § 51–5.2 that clarified the Commission's authority to authorize and deauthorize mandatory sources.

Discussion: Only the Commission can authorize an NPA, and once an NPA is authorized, it naturally stands that the Commission has the authority to deauthorize an NPA if it has a legitimate basis for doing so. For example, this may occur if an NPA fails to maintain qualifications, no longer desires or is no longer capable of providing products or services to the Government, or is otherwise not performing up to the standards of the Commission or the Federal customer.

Changes to the Rule: None.

Regulatory Procedures

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives. E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and promoting flexibility. E.O. 13563 further recognizes that some benefits are difficult to quantify and provided that, where appropriate and permitted by law, agencies may consider and discuss qualitative values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

Impact of Final Rule

In the NPRM, the Commission acknowledged that the proposed rule changes were applicable to all NPAs and estimated the proposed rule change would have the most impact on 27 percent of NPAs, approximately 122 out of 450 NPAs. However, the final rule bifurcates the price competition threshold from $10 million in total project value for all service requirements on the PL to $50 million for DoD agencies and $10 million for non-DoD agencies. This change from the NPRM significantly reduces the final rule's impact and scope by over 50 percent, from approximately 346 to 155 PL service requirements. Additionally, the final rule's bifurcated price

[70] *Supra* note 9.

competition threshold substantially reduces the percentage of NPAs potentially impacted to 15 percent, approximately 63 NPAs.[71]

As discussed in the NPRM, an average of one-fifth of all applicable AbilityOne service contracts would be eligible for price competition in any given year. With the changes to the total annual contract value threshold, a maximum of approximately 31 contracts per year would be eligible for competitive distribution on an annualized basis. The exact number of price competitions will still be based on how many requests for price competition the Commission receives and ultimately approves. In SourceAmerica's 2022 Federal Customer Survey Final Report, the surveyed Federal customers reported satisfaction ranged from on average approximately 84% to 89% of Federal customers who responded to the survey were overall satisfied with their AbilityOne contractor.[72] Therefore, based on this data, of the 155 PL service requirements eligible for competition under this rule, the Commission generally anticipates that 11%–16% or 17–25 requirements may yield a request for competition over a 5-year period. As a result, the Commission estimates that the number of requests for price-inclusive competitions will likely fall somewhere between 3 to 5 per year in the first several years of implementation. This number could increase with the inclusion of the price impasse trigger. But as previously noted, the Commission receives an average of 2 price impasse requests on an annual basis, and a vast majority of those are for products which are outside the scope of this regulatory change.

The Commission believes the benefits of introducing a price component into the competitive distribution process includes increasing transparency in the NPA selection process, engaging the Federal customer in the process, and incentivizing better NPA performance and more competitive pricing. Most PL service requirements above the $10 million threshold are DoD contracts. Therefore, as discussed above, in response to public comments regarding the number of service requirements subject to potential price competition, the potential negative impact on smaller NPAs, and requests to align the rule's threshold to the Panel recommendation, the Commission raised the final rule's threshold to $50 million total project value for DoD agencies. However, the final rule preserves a lower threshold of $10 million total project value for non-DoD agencies and allows the Commission to remain responsive to the needs of civilian Federal agencies and the Commission's Strategic Plan.

Costs of the Final Rule

As discussed earlier in response to comments, competition is not mandatory, and the Commission's determination to approve a competition will be done on a case-by-case and informed basis. For both new and existing PL additions, if the Commission ultimately approves a request for a competitive distribution, authorized NPAs will incur the cost of preparing a competitive proposal. An incumbent NPA may also incur transition costs if it loses a competitive distribution, however, transition costs may be reimbursable under the existing Federal contract. Additionally, the competitive distribution process means an incumbent NPA is at risk of losing the revenue from a service requirement. However, the Commission notes that while the lost revenue is a cost for the incumbent NPA, the revenue would remain within the Program because the service requirement would go to another authorized NPA. For new PL additions, the cost of preparing a proposal is significantly outweighed by the new revenue stream into the Program.

SourceAmerica initially reported it would need 14 full-time equivalents (FTEs) in additional staff or $1.5 million annually to handle 336 potential price-inclusive competitive allocations. However, under the final rule's bifurcated threshold, CNAs would incur costs based on the approximately 155 service requirements that are eligible for a price competitive distribution, 150 of which fall under SourceAmerica. Based on this new reduced scope, if the Commission approved every request for a competitive distribution, SourceAmerica would need six full-time equivalents FTEs in additional staff or $670,000. But as noted above, approval of all 150 possible competitions over the 5-year period is highly improbable, based on available customer satisfaction data and the fact that Commission approval lies at the heart of every request. Additionally, even when a competition is approved, the CNAs' costs would likely be offset by the Federal customer's involvement and support. For instance, in support of each pilot, the requesting agency provided several FTEs of assistance in the form of price analyst, technical evaluators, and other subject matter experts.

Once the final rule is implemented, the Commission expects that if the Federal customer requests a competitive distribution, it will provide personnel to assist with the evaluation of technical capability, past performance, and price analysis. The cost to the Federal customer will ultimately vary based on how much support it provides to the Commission and applicable CNA. The Federal customer may also incur costs due to the disruption in contract performance or administrative costs associated with replacing an incumbent contractor, however, that is a calculation the Federal customer must make prior to requesting a competitive distribution.

The Commission initially estimated that it will need an additional budget of $1.75 million annually to support a competitive allocation.[73] Like the CNA estimate, these numbers were based on the worst-case scenario of 336 possible competitions. However, due to the reduced scope and the expectation that the Commission would likely process no more than 3 to 5 request per year, the cost to the agency would be no greater than a fourth of the original estimate or 3 to 4 additional FTEs (*i.e.,* a competition lead, a contract specialist, and up to two additional price analysts).

As discussed throughout this rulemaking, subsection (f)(2) of the Act directed the Commission to make a good faith effort to implement the Panel's recommendations. If the Commission unduly delayed or ignored the Panel's recommendations, in subsection (g)(1)(A) of the Act, the Secretary of Defense was given the authority to ''suspend compliance with the requirement to procure a product or service in Section 8504 of title 41, United States Code.'' Currently, DoD's spending represents over half of the Program's $4 billion portfolio, which creates tens of thousands of jobs for individuals with significant disabilities or who are blind. Introducing competition prevents DoD's withdrawal from, or reduced participation in, the Program, thereby protecting the jobs and objectives of the Program.

The Commission believes that the potential costs from implementation of the final rule are greatly outweighed by the benefits to the NPA community, the CNAs, and the Federal customer. As noted elsewhere, making the Program responsive to the Panel's recommendations will help to secure the jobs the Program currently creates and increase the agency's prospects of adding more opportunities.

[71] This calculation is based on a total of 413 NPAs in the program as of September 30, 2023.

[72] *Supra* note 51.

[73] *See* The Third Annual 898 Report to Congress, dated January 2021 at p. 33. This is based on analysis from the first two pilot tests conducted by the Commission, which called for hiring an additional 8–12 FTEs, benefits, equipment, and IT support.

Regulatory Flexibility Analysis

Under the Regulatory Flexibility Act (RFA),[74] an agency can certify a rule if the rulemaking does not have a significant economic impact on a substantial number of small entities. This final rule only imposes a burden on NPAs with contracts that fall within the bifurcated threshold of $50 million in total project value for DoD agencies and $10 million in total project value for non-DoD agencies. In total, approximately 63 NPAs out of 413 participating NPAs have applicable contracts that may be impacted by this rule. This number, however, is only applicable if every possible contract is competed and, as discussed above, competition is not mandatory and is at the discretion of the Commission. Moreover, this rule only establishes business rules to improve the AbilityOne Program processes and does not require any new reporting, recordkeeping, or other compliance requirements for small entities.

Accordingly, the Commission certifies this rule will not have a significant economic impact on a substantial number of small entities, and, therefore, no final regulatory flexibility analysis has been prepared.

Unfunded Mandate Reform

This final rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments.

Paperwork Reduction Act

This final rule does not contain an information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Accordingly, it does not impose any burdens under the Paperwork Reduction Act and does not require further OMB approval.

Small Business Regulatory Enforcement Fairness Act of 1996

This final rule would not constitute a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This final rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign based companies in domestic and export markets.

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Commission will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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List of Subjects

41 CFR Part 51–2

Government procurement, Individuals with disabilities, Organization and functions (Government agencies).

41 CFR Parts 51–3 and 51–5

Government procurement, Individuals with disabilities.

The Executive Director of the Commission, Kimberly M. Zeich, having reviewed and approved this document, is delegating the authority to electronically sign this document to Michael R. Jurkowski, for purposes of publication in the **Federal Register**.

Michael R. Jurkowski,

Director, Business Operations.

For reasons set forth in the preamble, the Commission amends 41 CFR parts 51–2, 51–3, and 51–5 as follows:

PART 51–2—COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

■ 1. The authority citation for part 51–2 is revised to read as follows:

Authority: 41 U.S.C. 8501–8506.

■ 2. Amend § 51–2.7 by:

■ a. Revising the second and third sentences and removing the fourth sentence of paragraph (a); and

■ b. Revising paragraphs (b) and (c).

The revisions read as follows:

§ 51–2.7 Fair market price.

(a) * * * The Committee is responsible for determining fair market prices, and changes thereto, for commodities and services on the Procurement List. The initial fair market price may be based on, where applicable, bilateral negotiations between contracting activities and authorized nonprofit agencies, market research, comparing the previous price paid, price competition, or any other methodology specified in Committee policies and procedures.

(b) The initial fair market price may be revised in accordance with the methodologies established by the Committee, which include, where applicable, bilateral negotiations between contracting activities and authorized nonprofit agencies assisted by central nonprofit agencies, the use of economic indices, price competition, or any other methodology permitted under the Committee's policies and procedures.

(c) After review and analysis, the central nonprofit agency shall submit to the Committee the recommended fair market price and, where a change to the fair market price is recommended, the methods by which prices shall be changed to the Committee, along with the information required by Committee pricing procedures to support each recommendation. The Committee will review the recommendations, revise the recommended prices where appropriate, and establish a fair market price, or change thereto, for each commodity or service which is the subject of a recommendation.

PART 51–3—CENTRAL NONPROFIT AGENCIES

■ 3. The authority citation for part 51–3 continues to read as follows:

Authority: 41 U.S.C. 8501–8506.

■ 4. Revise § 51–3.4 to read as follows:

§ 51–3.4 Distribution of orders.

(a) Central nonprofit agencies shall distribute orders from the Government only to nonprofit agencies which the Committee has authorized to furnish the specific commodity or service. When the Committee has authorized two or more nonprofit agencies to furnish a specific commodity or service, the central nonprofit agency shall distribute orders in a manner that is fair and

[74] 5 U.S.C. 605.

equitable to each authorized nonprofit agency, and that provides the best value for the requiring Federal agency and best meets the mission of the Program.

(b) For new and existing Procurement List services that are estimated to exceed $10 million in total project value for a Federal agency, other than the Department of Defense and its components, or $50 million in total project value for the Department of Defense and its components, inclusive of the base period and all option periods, a Federal agency may, at the Senior Executive Service or Flag or General Officer level, request that the procurement be distributed to an authorized nonprofit agency on a competitive basis among all authorized nonprofit agencies. In addition to the requirements described at part 51–6 of this chapter, the requesting Federal agency shall advise the Committee of the rationale for competition, whether it will provide resources to support the competitive process, the independent government cost estimate of the contract being competed or of the resources to support the competitive process, any information pertaining to performance, and such other information as is requested by the Committee. The Committee will answer a request within 60 days of receipt unless additional information is needed.

(c) If the Committee accepts a request from a Federal agency for competitive distribution, the action will be forwarded to the responsible central nonprofit agency for assessment in accordance with § 51–3.2(b) through (d). Upon receipt of a recommendation from the central nonprofit agency, the Committee will determine whether a competitive distribution is appropriate after considering the suitability criteria described at § 51–2.4 of this chapter and applicable Committee policies and procedures. If the Committee decides that a competitive distribution is appropriate and authorizes at least two nonprofit agencies to serve as mandatory sources, a competitive distribution may commence upon notification in the **Federal Register**.

(d) After notification, the responsible central nonprofit agency shall select the authorized nonprofit agency that it determines provides the best value for the ordering Federal agency and meets the mission of the Program in accordance with the Committee's policies and procedures. The selection decision shall be based on criteria approved by the Committee, such as technical capability, past performance, and price. The selection decision may also consider any other criteria or subcriteria specific to the service requirement. In addition, each selection decision shall consider criteria or subcriteria that address the nonprofit agency's capability to provide opportunities related to training and placements, as well as employment, for individuals who are blind or have significant disabilities. Criteria may be weighted, but price shall not have greater weight than the non-price factors when combined, except for competitive distributions directed by the Committee in accordance with paragraph (e) of this section.

(e) The Committee may also direct a competitive distribution in accordance with paragraph (c) of this section for any service requirement already on the Procurement List that exceeds a total project value of $1 million, if bilateral negotiations described at § 51–2.7(b) of this chapter are attempted in good faith but fail to produce a recommendation to the Committee for revising the fair market price. A Federal agency may not request, and the Committee shall not direct a competitive distribution based solely on failed price negotiations, until the parties have exhausted all available remedies established within the Committee's pricing policies and procedures.

(f) Any dispute arising out of a competitive distribution decision described at paragraph (d) of this section shall be submitted to the appropriate central nonprofit agency for resolution. If the affected nonprofit agency disagrees with the central nonprofit agency's resolution, it may appeal that decision to the Committee for final resolution. Appeals must be filed with the Committee within five business days of the nonprofit agency's notification of the central nonprofit agency's resolution decision, and only a nonprofit agency that participated in the competitive distribution process described at paragraph (c) of this section may file an appeal.

PART 51–5—CONTRACTING REQUIREMENTS

■ 5. The authority citation for part 51–5 continues to read as follows:

Authority: 41 U.S.C. 8501–8506.

■ 6. Amend § 51–5.2 by revising the section heading and paragraphs (a), (b), (c), and (e) and adding paragraph (f) to read as follows:

§ 51–5.2 Authorization/deauthorization as a mandatory source.

(a) The Committee may authorize one or more nonprofit agencies to provide a commodity or service on the Procurement List. Nonprofit agencies that have been authorized as mandatory sources for a commodity or service on the Procurement List are the only authorized sources for providing that commodity or service until the nonprofit agency has been deauthorized by the Committee in accordance with the Committee's policies and procedures. To meet the needs of the ordering Federal agency, the central nonprofit agencies may distribute the commodity or service to one or more nonprofit agencies in accordance with § 51–3.4(a) of this chapter.

(b) After a determination of suitability for approving items on the Procurement List, the Committee will authorize the most capable nonprofit agencies as the mandatory source(s) for commodities or services. Commodities and services may be purchased from nonprofit agencies; central nonprofit agencies; Government central supply agencies, such as the Defense Logistics Agency, Department of Veterans Affairs, and General Services Administration; and certain commercial distributors. (Identification of the authorized sources for a particular commodity may be obtained from the central nonprofit agencies indicated by the Procurement List which is found at *www.abilityone.gov*.)

(c) Contracting activities shall require that their contracts with other organizations or individuals, such as prime vendors providing commodities that are already on the Procurement List to Federal agencies, require that the vendor orders these commodities from the sources authorized by the Committee.

* * * * *

(e) Contracting activities procuring services, which have included within them services on the Procurement List, shall require their contractors for the larger service requirement to procure the included Procurement List services from nonprofit agencies authorized by the Committee.

(f) If the Committee deauthorizes a nonprofit agency as the mandatory source, the deauthorized nonprofit agency shall ensure as many of its employees who are blind or have other significant disabilities as practicable remain on the job with the new authorized successor nonprofit agency. The successor nonprofit agency is required to offer a right of first refusal of employment under the successor contract to current employees of the deauthorized nonprofit agency who are blind or have other significant disabilities for positions for which they are qualified. The deauthorized nonprofit agency shall disclose necessary personnel records in accordance with all applicable laws

protecting the privacy of the employee to allow the successor nonprofit agency to conduct interviews with those identified employees. If selected employees agree, the deauthorized nonprofit agency shall release them at a mutually agreeable date and negotiate transfer of their earned fringe benefits and other relevant employment and Program eligibility information to the successor nonprofit agency. The requirement for a successor nonprofit agency to offer the right of first refusal also applies to an authorized nonprofit agency that is no longer serving as the mandatory source because of a competitive distribution under § 51–3.4(d) of this chapter.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 24–241; FR ID 209156]

Radio Broadcasting Services; Various Locations

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document amends the Table of FM Allotments, of the Federal Communications Commission's (Commission) rules, by reinstating certain channels as a vacant FM allotment in various communities. The FM allotments were previously removed from the FM Table because a construction permit and/or license was granted. These FM allotments are now considered vacant because of the cancellation of the associated FM authorizations or the dismissal of long-form auction FM applications. A staff engineering analysis confirms that all of the vacant FM allotments complies with the Commission's regulations. The window period for filing applications for these vacant FM allotments will not be opened at this time. Instead, the issue of opening these allotments for filing will be addressed by the Commission in subsequent order.

DATES: Effective March 22, 2024.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2700.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Order,* adopted March 12, 2024, and released March 12, 2024. The full text of this Commission decision is available online at *https://apps.fcc.gov/ecfs/.* The full text of this document can also be downloaded in Word or Portable Document Format (PDF) at *https://www.fcc.gov/edocs.* This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. The Commission will not send a copy of the *Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because these allotments were previously reported.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

Federal Communications Commission.

Nazifa Sawez,

Assistant Chief, Audio Division, Media Bureau.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

■ 2. In § 73.202(b), amend the Table of FM Allotments by:

■ a. Adding the entry for ''North English'' in alphabetical order under Iowa;

■ b. Adding the entry for ''Colfax'' in alphabetical order under Louisiana;

■ c. Adding the entry for ''Calhoun City'' in alphabetical order under Mississippi;

■ d. Adding the entry for ''Battle Mountain'' in alphabetical order under Nevada;

■ e. Under Oregon:

■ i. Revising the entry for ''Huntington''; and

■ ii. Adding entries for ''Independence'' and ''Monument'' in alphabetical order;

■ f. Adding the entry for ''Murdo'' in alphabetical order under South Dakota;

■ g. Adding the entry for ''Selmer'' in alphabetical order under Tennessee; and

■ h. Adding the entries for ''Camp Wood,'' ''Cotulla,'' ''Los Ybanez,'' ''Ozona,'' and ''Stamford'' in alphabetical order under Texas.

The additions and revision read as follows:

§ 73.202 Table of Allotments.

* * * * *

(b) * * *

TABLE 1 TO PARAGRAPH (b)

U.S. States	Channel No.
* * * * *	
Iowa	
* * * * *	
North English	246A
* * * * *	
Louisiana	
Colfax	267A
* * * * *	
Mississippi	
* * * * *	
Calhoun City	272A
* * * * *	
Nevada	
Battle Mountain	253C2
* * * * *	
Oregon	
* * * * *	
Huntington	228C1, 294C1
Independence	274C0
Monument	280C3
* * * * *	
South Dakota	
* * * * *	
Murdo	265A
Tennessee	
* * * * *	
Selmer	288A
Texas	
* * * * *	
Camp Wood	251C3
* * * * *	
Cotulla	289A
* * * * *	
Los Ybanez	253C2
* * * * *	
Ozona	275A
* * * * *	
Stamford	233A
* * * * *	