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## *Small Business*

### **Putting AbilityOne Contracts Under The Microscope**



BY DEVON HEWITT

In this era of shrinking budgets, every contract and every contracting opportunity counts. As a result, certain contracting actions that traditionally have not been considered controversial are now being put under the microscope. The United States Court of Federal Claims recently issued a decision in such a case: *Systems Application & Technologies, Inc. v. United States*, Fed. Cl., No. 12-562C (December 10, 2012). The case involves a protest filed by Systems Application & Technologies, Inc. (“SA-TECH”) challenging the decision of the Army to procure a contract for the operation and maintenance of a missile range at the Yakima Training Center (“YTC”) under the AbilityOne program. The AbilityOne program, authorized by the Javits-Wagner-O’Day Act, provides employment opportunities for individuals who are blind or have “severe disabilities.” The program is administered by the Committee for Purchase From People Who Are Blind or Severely Disabled (the “Committee”). The Committee is responsible for developing a “Procurement List” of products and services that are suitable for the federal government to procure from qualified non-profit agencies which employ a workforce of blind or severely disabled individuals. Under Federal Acquisition Regulation Part 8, Required Sources of Supplies and Services, if a service is listed on the Procurement List, agencies must order the services pursuant to the AbilityOne Program before considering the Federal Supply Schedules, Federal Prison Industries or commercial sources.

**Facts and Court’s Decision.** In the *Systems Application* case, the requirement for the operations and maintenance of the YTC missile range was not on the Procurement List and, at the time the protest was filed, was being performed by SA-TECH. The Army, however, began exploring whether the requirement was suitable for the AbilityOne program. There are a number of hurdles that have to be cleared before a requirement can be added to the Procurement List: the requirement must allow for the potential to generate employment for persons with severe disabilities; the nonprofit agency charged with providing the service employees must demonstrate that it has the capability of meeting government quality standards; and an assessment must be made of the impact of moving the requirement from the current contractor performing the service to the AbilityOne program. After reviewing these issues, the Committee and the Army ultimately decided the requirement could be placed on the Procurement List, and SA-TECH protested that determination.

The court granted the protest, holding that it was arbitrary and capricious for the Army and the Committee to conclude the requirement for operations and maintenance of the YTC missile range should be placed on the Procurement List. In particular, the court agreed with SA-TECH that (1) placing the requirement on the Procurement List likely would not create jobs for the severely disabled and (2) the nonprofit agency charged with providing the employees could not meet the Army’s quality standards for the work.

The administrative record contained a number of facts supporting the court’s decision. The YTC missile range is located in western Washington state, described as a “remote desert area” by the court. There is no public transportation to the site. In addition, the record indicated that all the job descriptions required employees be able to drive, lift up to 100 pounds, engage in strenuous physical work and be available 24 hours a day. The court remarked that because of the location of the site and the rigorous physical job requirements, it was unreasonable to credit the Committee’s determination that there would be a sufficient number of “severely disabled” individuals to perform the contract work. In fact,

the nonprofit agency supplying the workforce admitted it anticipated only nine “severely disabled” individuals would be available at the contract start date. Finally, although the nonprofit agency claimed it had responsibility for performing similar contracts for other ranges, the record did not support the conclusion that the other requirements had the same physical and environmental characteristics as the YTC contract. In short, the record demonstrated fairly clearly that the YTC missile range requirement was entirely unsuitable for the AbilityOne program.

**Significance of Case.** The case and the court’s decision are revealing in a number of respects. Small businesses often complain that many requirements that otherwise might be subject to a small business set-aside competition are funneled to the AbilityOne program inappropriately. After reading the *Systems Application* case, this appears to be a valid complaint. In particular, the case highlights several problems with the AbilityOne program that have not been the subject of much discussion in the procurement community. The first is the definition of “severely disabled” in the Act. Under the Act, the term “severely disabled” means a person who has a severe physical or mental impairment that so limits that person’s functional capabilities “that the individual is unable to engage in normal competitive employment over an extended period of time.” The record produced in the *Systems Application* case demonstrated that neither the Committee nor the nonprofit agency seeking to perform the YTC missile range contract had a common understanding of the implications of that definition. For example, in support of its representations that about 60 percent of the necessary staff for the contract would be “severely disabled,” the nonprofit agency explained it might use some incumbent personnel. The court rejected that contention, however, noting that, because these individuals were already employed, they did not meet the definition of “severely disabled.”

The case also indicates the AbilityOne program contracts are not subject to much oversight. The Government Accountability Office came to a similar conclusion in a report issued in 2007. In the report, GAO acknowledged the definition of “severe disability” “allows for

differing interpretations,” which complicates efforts to ensure compliance. The report explained the Committee delegates most of its oversight responsibilities to two central nonprofit agencies that also represent the interests of the nonprofit agencies performing the work. In the case of the “severely disabled,” the oversight agency is the National Industries for the Severely Handicapped (now called “NISH”). NISH charges a fee based on the nonprofit agencies’ sales to the government. The GAO noted that this “system of compensation may create a disincentive” for the oversight agencies to identify instances of noncompliance that could result in the nonprofit agency losing its contract, especially for those nonprofits generating a large volume of federal work.

The GAO’s observations and the *Systems Application* decision are not the only indications that the AbilityOne program might not be fulfilling its purpose. In October of this year, the Justice Department reached a \$5 million settlement with ReadyOne Industries, a participant in the AbilityOne program, resolving allegations that the organization violated the False Claims Act by knowingly submitting false certifications regarding the percentages of individuals in their workforce with “severe disabilities.” In July 2011, the Justice Department reached a smaller settlement of \$400,000 with another AbilityOne participant, PRIDE Industries, for the same reason. (Interestingly, the contract held by PRIDE was cited by the nonprofit agency in the *Systems Application* case as evidence that other nonprofit agencies benefiting the severely disabled had performed requirements similar to the YTC missile range requirement.). Both these cases were brought to the attention to the Justice Department by whistleblowers.

Given the government’s heightened scrutiny of fraud in government procurement in general and in small business contracting programs in particular, it is surprising that the vulnerabilities of AbilityOne program have escaped its attention. The recent Justice Department settlement and the *Systems Application* case suggest it’s long overdue for the government to take a hard look at the program.