

Court of Federal Claims Dismisses Contract Award to AbilityOne Entity

Written by Nick Sanders

Wednesday, 09 January 2013 00:00

We have worked with the AbilityOne Program for many years. For the past two years, we have taught courses on behalf of the NISH Leadership Academy, preparing AbilityOne contractors to successfully pass DCAA audits. One of our largest clients is an AbilityOne entity, working at military bases throughout the country. We passionately support the AbilityOne Program and its mission of giving meaningful jobs to people with disabilities, including severely wounded warriors returning from military service.

This is not to say that we don't have some choice words of criticism for the Program.

In fact, the fairly recent emphasis by the Defense Department on AbilityOne contracting, making AbilityOne sources "preferred" over other potential sources, has contributed to the enormous growth of the Program. In turn, that rapid growth has led to some management issues. We have observed the leadership of the AbilityOne Program struggle to adapt and evolve in response to challenges created by its growth and by its new Defense customers. The AbilityOne Leaders have not always made the wisest of decisions in response to those challenges, sometimes holding on to "the way it's always been done" despite the needs of its newly expanded operating environment.

Recently, the Court of Federal Claims felt the need to [point out](#) some of the problems with the AbilityOne Program's eagerness to expand its contracting opportunities (which in turn would create more opportunities for those with disabilities). The decision was the result of a bid protest filed by Systems Application & Technologies, Inc. (SA-TECH), who was the incumbent O&M contractor at the Yakima Training Center in the State of Washington before the Army intended to award its contract to Skookum Educational Systems, an AbilityOne entity. Skookum, who had "zero experience" with the scope of work, proposed to perform the O&M work with at least 60 percent "severely disabled" workers.

As Judge Bruggink wrote—

While to an outsider it would appear that what the Army proposes is sheer folly, the government has aggressively defended its actions as permissible under the Javits-Wagner-O'Day Act ('JWOD'), 41 U.S.C. §§ 8501-506. That act authorized creation of the Committee for Purchase from People Who Are Blind or Severely Disabled (the 'Committee' or 'AbilityOne'). ... The Committee is responsible for developing a 'Procurement List' of products and services which are suitable for the Federal Government to procure from qualified nonprofit

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agencies ('NPA') which employ a workforce of blind or severely disabled individuals. ...

Here, the Committee, with the Army's concurrence, has designated the contract suitable for addition to the Procurement List and for award on a sole source basis to Skookum, an AbilityOne NPA.

Not everybody was excited at the idea of having severely disabled people performing range management functions. One memo introduced into the record stated, "The stringent requirements under the contract to conform to all OSHA regulations, all explosive ordnance directives and to operate safely in a highly dangerous work environment could be compromised by a severely disabled workforce."

One key issue concerned the definition of "severely disabled" and whether there were a sufficient number of such people in the remote desert area of western Washington, and whether such people (if they could be found) could safely perform the required work. One Army Memorandum questioned whether "having a labor force that has severe mental and physical disabilities, monitored by non-medical supervisors / work leads, and working in what can be a harsh and stressful environment, will produce a positive outcome." The Committee held many discussions with stakeholders, including counsel for SA-TECH, and expressed disagreement with the notion that disabled people could not safely perform range O&M services. The Judge related the following exchange—

... [C]ommittee member Kathy Martinez told plaintiff's counsel, 'I am very concerned about your concept of what a significant disability means and what people with significant disabilities can do? I happen to be a blind person. I don't work on a shooting range, but I am you know, a significant, I am a person with a significant disability who is employed. And, I am unaware that the term significant disability means that you can't hold down a job.' ... After plaintiff's counsel read the statutory definition of 'severely disabled,' Ms. Martinez replied, 'I think that's a very antiquated definition frankly.'

As the Judge wrote—

Nine [Committee] members voted in favor, one was undecided, and three disapproved. ... The three dissenting members of the Committee expressed doubts as to the propriety of awarding this contract through AbilityOne. They were concerned because the principal behind the incumbent contractor was a disabled person who employed service disabled and other veterans, the work did not seem safe for severely disabled individuals, Skookum was allowed a long phase in period and a low goal for the percentage of severely disabled individuals employed, and Skookum had not presented a plan for transporting severely disabled individuals 33 miles to and from YTC.

SA-TECH filed a bid protest against the Army and its decision to give the work to Skookum

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under the auspices of the AbilityOne Program. The primary basis of the protest was that the Committee failed to enforce the statutory requirement that at least 75 percent of the contract direct labor hours be performed by the severely disabled. The Committee took the position that the ratio severely disabled labor hours should be applied to the AbilityOne NPA *as a whole*, and not to any particular contract. But the Judge decided the protest on other grounds and did not resolve that difference of opinion.

Judge Bruggink found that the Committee's decision to add the Yakim range O&M services to the Procurement List was "arbitrary and capricious." He wrote—

It is uncontroverted that the YTC contract is not the same as the work Skookum does at Fort Bliss and White Sands. Describing the YTC contract as merely 'facilities maintenance' makes it sound more like other AbilityOne work, but that description is inaccurate. Conditions on the range are stress-inducing ... and involve the explosion of munitions during live fire. An unavoidable question should have been, is it appropriate to put someone who has severe post-traumatic stress disorder with depressive and anxiety disorder on or even near a live fire range. Or, can someone who has degenerative joint disease or polio meet the physical requirements of the job ...

Instead of asking such questions, the Committee staff shifted the burden to SA-TECH and relied on high-minded policy ... It was not SA-TECH's burden to show that severely disabled are 'inherently incapable' of performing any of the tasks on the YTC contract. It was Skookum's burden, given the numerous reasons for concern, to show that there were a sufficient number of specific jobs that could be done by severely disabled workers. Instead of thinking critically about whether severely disabled individuals are capable of performing the contract, the Committee criticized SA-TECH for assuming 'that Skookum will perform the work in the same way that SA-TECH has in the past,' and uncritically accepted Skookum's unsupported claim that doing the work in some unspecified different way somehow solves the technical problems posed by the YTC contract. ...

On the basis of the existing record, it was arbitrary and capricious for the AbilityOne Committee to designate the YTC for placement on the Procurement List. Because Skookum was the only contractor being considered, that means that its designation as the contractor for the work was also arbitrary and capricious.

Consequently, the Army was prevented from awarding the contract to Skookum.

This decision has clear implications for the AbilityOne Program. First, it indicates that Courts will take seriously the statutory definition of "severely disabled" and so it behooves the Committee and AbilityOne contractors to use that statutory definition with respect to workers who might be called on to perform the contract SOW. It means that challenging work—work not

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traditionally performed under the AbilityOne program—should be critically evaluated to ensure that it can be safely performed by individuals who meet the statutory definition. Scoffing at “antiquated definitions” will not work when legal challenges are presented.

Second, the decision should be interpreted as a signal that the AbilityOne Program has limits on its ability to grow, and that those limits are inherent in the Program’s mission. AbilityOne NPAs cannot do everything under the sun; they can only do the work that they can do safely, consistent with the disabilities of those it employs. While it may be tempting to add contract after contract to the Procurement List, that temptation must be tempered by the realization that some work is simply inappropriate to add.

Third, DOD contracting officers looking to respond to the official preference for AbilityOne contract awards—a pressure that will only grow along with the numbers of wounded warriors exiting service—need to evaluate the work requirements in light of the fact that a number of the individuals performing the work will be severely disabled (as that term is defined by statute). There is a lot of work that can be performed by the severely disabled; but not all work can be performed by them. This decision can be used to educate government personnel about the types of work that can, and cannot, be performed—and how the requirements should be evaluated for suitability.

Finally, it’s time for the AbilityOne Program leadership team to use this decision to identify processes and procedures it needs to change, in order to provide assurance that the Program is not over-reaching and is safely operating within its statutory intent. It ought to serve as a wake-up call that the way things have been done will not work in the current environment, and that new management approaches are required.

The AbilityOne Program is too important to founder on the shoals of historic management approaches and practices. It needs to adapt to the current environment, so that it can maximize the number of severely disabled individuals it can employ.

It needs to adapt and change in order to remain successful.

There are many who can assist with that change.

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Let them help.