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## **COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED**

**41 CFR Parts 51-3.5 and 51-4.4**

**RIN 3037-AA24**

### **Revising Central Nonprofit Agencies' Requirements to Charge Fees and Clarifying the Permissibility of Subcontracting within the AbilityOne Program**

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

**ACTION:** Notice of proposed rulemaking; request for comments

**SUMMARY:** This notice proposes to amend the Committee regulation at 41 CFR § 51-3.5 to formally codify the congressionally mandated requirements set forth in the Consolidated Appropriations Act of 2016, Pub. L. 114-113, Division H, Title IV, 129 Stat. 2639, December 18, 2015, which requires the central nonprofit agencies to enter into a written agreement with the Committee before charging fees to nonprofit agencies. This notice also proposes to amend the Committee's regulation at 41 CFR § 51-4.4 to clarify the definition of subcontracting within the AbilityOne Program, amend and reduce regulatory requirements to subcontract, streamline the approval process for use of subcontracting, and lessen the administrative burdens for selecting subcontractors.

**DATES:** The Commission must receive comments on these proposed revisions 30 days after publication, by June 1, 2026.

**ADDRESSES:** Comments must be submitted via the Federal eRulemaking Portal at *regulations.gov*, where you can also find a plain language summary of the proposed rule.

Information on using *regulations.gov*, including instructions for finding a rule on the site and submitting comments, is available on the site under "FAQ." Follow the instructions for submitting comments. Please be advised that comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

Accessible Format: Individuals with disabilities can obtain this document, as well as the comments or other documents in the public rulemaking record for the proposed regulations, in an alternative accessible format by contacting the individual listed in the FOR FURTHER INFORMATION section of this document.

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**FOR FURTHER INFORMATION CONTACT:** Cassandra Assefa, Attorney-Adviser, Office of General Counsel, Committee for Purchase From People Who Are Blind or Severely Disabled, 355 E Street SW, Suite 325, Washington, DC 20024; telephone: 202-430-9886; [cassefa@abilityone.gov](mailto: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. 41 CFR § 51-3.5 (Program Fee)**

##### **1. Cooperative Agreements and the Consolidated Appropriations Act of 2016**

The Committee for Purchase From People Who Are Blind or Severely Disabled, operating as the U.S. AbilityOne Commission (Commission) oversees the AbilityOne Program (Program). The Commission is authorized by the Javits-Wagner-O’Day Act (JWOD) and its implementing regulations<sup>1</sup> to administer the Program. The Program creates employment opportunities for individuals who are blind or who have other significant disabilities primarily by requiring

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<sup>1</sup> 41 U.S.C. Chapter 85, Committee For Purchase From People Who Are Blind or Severely Disabled

Government agencies to purchase selected products and services from nonprofit agencies employing such individuals.

The JWOD Act directs the Commission to designate central nonprofit agencies (CNAs) to facilitate, by direct allocation, subcontract, or any other means, the distribution of Government orders of products and services among nonprofit agencies (NPAs) employing individuals who are blind or have severe disabilities.<sup>2</sup> The Commission has designated National Industries for the Blind (NIB) and SourceAmerica as the nonprofits that perform the CNA roles and responsibilities.<sup>3</sup> Additionally, under the Commission's regulations, 41 CFR § 51-3.5, the CNAs are able to collect a program fee for facilitating the NPAs' participation in the program.<sup>4</sup>

In 2013, the U.S. Government Accountability Office (GAO) conducted an audit of the AbilityOne Program to determine how the Commission: "(1) directs and oversees the CNAs; (2) adds products and services to the program and assigns affiliates to provide them; and (3) prices program projects."<sup>5</sup> The GAO noted that the existing structure did not require the CNAs to take certain action and often had to "seek [the CNAs] voluntary cooperation" to carryout Commission directives.<sup>6</sup> GAO concluded that the Commission lacked sufficient authority and procedures to help ensure the effectiveness, efficiency, and integrity of CNA operations and that the lack of a written agreement was a key factor contributing to the voluntariness of the parties' relationship.<sup>7</sup> To strengthen the Commission's oversight of the Program, the GAO recommended that the parties enter into "a written agreement with each CNA that specifies key expectations for the CNA and mechanisms for the Commission to oversee their implementation."<sup>8</sup> The Commission

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<sup>2</sup> 41 U.S.C. § 8503(c)

<sup>3</sup> 41 CFR 51-3.1. The existing regulation references the National Industries for the Severely Handicapped (NISH). In 2013 NISH began operating as SourceAmerica.

<sup>4</sup> 41 CFR § 51-3.5

<sup>5</sup> Report to the Committee on Oversight and Government Reform, House of Representatives, *Employing People With Blindness Or Severe Disabilities: Enhanced Oversight of the AbilityOne Program Needed*, GAO 13-457 (2013)

<sup>6</sup> *Id.* at 13.

<sup>7</sup> *Id.* at 33.

<sup>8</sup> *Id.*

agreed with the GAO's recommendation to enter into a written agreement; however, no such agreement was reached.

Subsequently, in 2016, Congress intervened and mandated changes to AbilityOne Program through the Consolidated Appropriations Act of 2016 (2016 CAA). These changes included Congressional reporting requirements and the creation of an Office of Inspector General.<sup>9</sup> Particularly, relevant to this rulemaking, the CNAs were required to enter into written agreements with the Commission.<sup>10</sup> The 2016 CAA did not specify the type of agreement, but it did state that "a fee may not be charged under section 51-3.5 of title 41, Code of Federal Regulations, unless such a fee is under the terms of the written agreement between the Committee and any such central nonprofit agency."<sup>11</sup>

Congress also directed that the written agreements establish expectations for each CNA and mechanisms for Commission oversight. These required elements included: (1) formalizing the roles and responsibilities of the Commission and CNAs in project assignment procedures, including decision-making processes; (2) expenditures of funds; (3) performance goals and targets; (4) governance standards to prevent fraud, waste, and abuse; (5) access to data and records; (6) consequences for not meeting expectations; (7) periodic evaluations and audits on affiliates; (8) periodic review and updates on pricing information define the measures of accountability used to evaluate the CNAs; and (9) provisions for updating the agreement.<sup>12</sup>

## **2. Cooperative Agreements and the Applicability of 2 CFR Part 200**

In the Summer of 2016, the Commission entered into written agreements (first-generation cooperative agreements) with both CNAs to govern their relationships with the Commission, establish measurable performance metrics, and satisfy the mandates established in the 2016

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<sup>9</sup> Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015).

<sup>10</sup> Prior to this mandate, no written agreement existed between the Commission and CNAs.

<sup>11</sup> *Id.* at Division H, Title IV, §§ 01-402, 129 Stat. 2242, 2639.

<sup>12</sup> House of Representatives; Congressional Record Vol. 161, No. 184, page H10292.

CAA.<sup>13</sup> Although these agreements were characterized as “cooperative agreements,” the agreements lacked the formality and administrative framework typically found in a cooperative agreement. This was largely due to the ambiguity surrounding how to properly characterize the program fee. More specifically, unlike other types of Federal awards or financial assistance, the Committee does not directly provide the program fee to the CNAs. Instead, through regulation, it authorizes CNAs to collect a fee from its affiliated NPAs contracted with the Federal government. The NPAs are expected to pass this fee on to the Federal government as an allowable expense under the contract.<sup>14</sup> Nevertheless, the parties were able to finalize operative agreements by adopting portions of 2 CFR § 200 and Federal Acquisition Regulation (FAR) based principles, without specifically relying on any authoritative source. In essence, the first-generation cooperative agreements functioned more like memoranda of understanding with quasi-contractual requirements than cooperative agreements. The first-generation cooperative agreements were extended several times but were finally set to expire in December of 2024. On July 8, 2024, the Commission established an Ad Hoc Commission Panel for Cooperative Agreements to better align the CNA’s mission with the objectives of the Commission’s most recent 5-year Strategic Plan.<sup>15</sup> Rather than the ad hoc framework used in the first-generation cooperative agreements, the Commission included the Uniform Administrative Requirements, Cost principles, and Audit Requirements (2 CFR Part 200) in the second-generation cooperative agreements.<sup>16</sup> The parties finalized and signed the second-generation agreements in December 2024.

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<sup>13</sup> Agreements can be found at [https://www.abilityone.gov/laws\\_regulations\\_and\\_policy/foia\\_reading\\_room.html](https://www.abilityone.gov/laws_regulations_and_policy/foia_reading_room.html).

<sup>14</sup> There is no statutory authorization for a central nonprofit agency (CNA) to collect “Program Fee” from contracting activities who purchase products and services from nonprofit agencies (NPA) who sell products and services to the Federal government. *See* 41 U.S.C. § 8503(c). The Commission’s regulation at 41 CFR § 51-2.2(f) authorizes the Commission to first designate a fee, and then to set “appropriate ceilings on fee paid to “these nonprofit agencies selling items under the AbilityOne Program . . .” The Commission’s regulation at 41 CFR § 51-3.5 authorizes a CNA to charge fees to an NPA for facilitating their participation in the AbilityOne Program. *See* 41 CFR § 51-3.2(a). Commission Policy 51.601, § 6(d), effective August 8, 2025, categorizes Program Fee as an allowable cost for the NPA to deliver a product or service under the AbilityOne Program

<sup>15</sup> U.S. AbilityOne Commission Strategic Plan for Fiscal Years 2022-2026.

<sup>16</sup> 31 U.S.C. § 6301 et seq. *See* 31 U.S.C. § 6301(2). Although Congress did not specifically direct that the Commission use a cooperative agreement, the citations following each Congressionally required element track 2 CFR § 200. Roles and responsibilities on the part of the Commission and the CNA in project assignment procedures,

The Office of Management and Budget (OMB) issued 2 CFR Part 200 to ensure consistent and uniform government-wide policies and procedures for the management of Federal agencies' grants of Federal awards to non-Federal entities and cooperative agreements and it governs all grants and cooperative agreements issued by the U.S. Government and applies to all Federal funding in its entirety.<sup>17</sup> Under the Federal Grant and Cooperative Agreement Act (FGCAA), an executive agency shall use a cooperative agreement as the legal instrument reflecting a relationship between the United States Government and a recipient, defined as a recipient authorized to receive United States Government assistance or procurement contracts, when the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States.<sup>18</sup> The FGCAA does not define, characterize, or limit the "thing of value" to appropriated funds. Instead, the FGCAA defines assistance as "anything of value for a public purpose of support or stimulation authorized by a law of the United States."<sup>19</sup>

Accordingly, under the JWOD Act, Commission regulations, and the 2016 CAA, the program fee can be construed to serve as a "federal award" or a form of "financial assistance" that the CNA is authorized to collect for facilitating NPA participation in the AbilityOne Program. Specifically, under the existing 41 CFR § 51-3.5, the Commission authorizes the CNAs

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including decision making processes; Expenditures of funds (2 CFR § 200.1), including policy governing reserve levels (§ 200.433(b)); Performance goals and targets (§ 200.201(b)(1)); Governance standards and other internal controls to prevent fraud, waste, and abuse (§ 200.303), including conflict of interest (§ 200.112) disclosures (such as the names of CNA board members who have an affiliation with nonprofits receiving contracts) and reports of alleged misconduct; Access to data and records (§ 200.315); Consequences for not meeting expectations (§ 200.339); Periodic evaluations and audits on affiliates (§ 200.501 & Subpart F); Periodic review and updates on pricing information (§ 200.201), and Provisions for updating the agreement (§ 200.309).

<sup>17</sup> See generally 2 CFR §§ 200 and 200.100(a). CFR § 1.200. 2 CFR § 200 describes requirements from pre- through post-award, including property standards; procurement standards; performance and financial monitoring and reporting; subrecipient monitoring and management; record retention and access; remedies for non-compliance with an award or subaward; and award closeout and post-closeout responsibilities. It also sets forth cost principles, including specific guidance on selected items of cost, to guide recipients and subrecipients in their use of Federal funds.

<sup>18</sup> Public Law 95-224, 92 Stat. 3 (1978); 31 U.S.C. § 6305 (emphasis added). The definition of and applicability of the use of a cooperative agreement as an instrument is even more expansive under 2 CFR § 200. It specifically states that cooperative agreements are [u]sed to enter into a relationship the principal purpose of which is to transfer *anything of value* to carry out a public purpose authorized by a law of the United States,

<sup>19</sup> 31 U.S.C. § 6101(3). The definition of federal award and financial assistance within the 2 CFR § 200 is broad enough to apply to the program fee and the terms "federal award" and "financial assistance" are used interchangeably throughout the regulation.

to charge the NPAs a fee from procurement contracts and allows that fee to be a cost to the Federal customer on the products and services sold to the government.<sup>20</sup> The NPAs, by extension, are required by regulation and policy to remit this fee to the CNA. The NPA, however, is not expected to absorb this expense. Instead, the NPA may treat it as an allocable expense under a Federal contract that it can pass on to the Federal government. By authorizing the CNA to collect fees and directing NPAs to remit fees, the Commission is, by regulation, transferring a thing of value to the CNA to which the CNA otherwise has no claim, right, entitlement, or title.<sup>21</sup> If the Commission did not authorize the collection of the fee, the services provided by the CNAs would function as an “unfunded mandate,” or it would be forced to rely on the voluntary contributions of the NPAs within their networks. To ensure that CNAs are properly compensated for carrying out responsibilities under the statute and Commission regulation, the Program Fee was formally mandated via Commission regulation in 1991.<sup>22</sup> However, no substantive changes have been made to § 51-3.5 since then.

### **3. Comments on Program Fee**

The primary purpose of the program fee is to foster the creation of employment opportunities for participating employees through the use of Federal procurement as set forth in the Commission’s regulations, policy, and the cooperative agreements. The Commission is responsible for setting the ceiling for the program fee.<sup>23</sup>

Since the Program’s creation, the program fee ceiling has always been set as a percentage of sales. From 1938 to 1974, NIB served as the sole CNA in the Program, and its affiliated NPAs contributed 2% of sales to NIB to finance the CNA’s operating expenses. In 1966, the program fee was increased to 3% and again in 1968 to 4%. In 1974, SourceAmerica was established, and the ceiling remained at 4% for both CNAs until 2007. Since 2007, the ceiling has ranged from

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<sup>20</sup> See 31 U.S.C. 6101(3); 41 CFR § 51-3.5.

<sup>21</sup> *Id.*

<sup>22</sup> 56 FR 48979, Sept. 26, 1991.

<sup>23</sup> *Supra*, note 14.

3.9% to 3.75% and, at times, the Commission has established separate ceilings for each CNA.<sup>24</sup> The current program fee is set at 3.75% for both CNAs and this ceiling has been in place since 2020.

Therefore, as part of this proposed rulemaking, the Commission is also seeking public feedback on the current program fee to determine if it is the most cost-effective way to achieve the Program's employment mission. When providing comments, please consider providing responses to the following questions:

1. Does the current program fee strike the right balance between ensuring that the CNAs are properly resourced to accomplish their statutory mission and reducing the overall cost burden to the Federal government?
2. Should the Commission explore other ways to set that program fee that would have the overall effect of lowering it, such as adopting a tiered system of fees or a flat fee not based on a percentage of sales?

#### **B. 41 CFR § 51-4.4 (Subcontracting)**

The JWOD Act authorizes the Commission to determine which products or services are suitable for sole-source procurement and placed on the Procurement List (PL). Once an item is placed on the PL, it is deemed a mandatory source to supply the product or service. The significance of being a mandatory source is two-fold. First, Federal agencies do not follow normal competitive procedures when acquiring products or services on the PL. Instead, Federal agencies are *required* to procure the listed item from the authorized NPA (and only that NPA) identified on the PL. Second, a PL addition serves as a catalyst for job creation for individuals who are blind or have severe disabilities.<sup>25</sup> In fiscal year 2025, NPAs under the AbilityOne Program employed approximately 41,000 significantly disabled and blind individuals in support of nearly \$4 billion in government contracts.

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<sup>24</sup>On July 1, 2013, National Industries for the Severely Handicapped (NISH) changed their name to SourceAmerica. From 2007 to 2020, the program fee was set at different rates from SourceAmerica and NIB.

<sup>25</sup> See FAR subpart 8.7.

The AbilityOne Program is first and foremost an employment program, but in order to maintain and increase job growth, NPAs must be able and willing to provide timely and professional contract performance. In most cases, the NPA is able to identify qualified workers from the pool of significantly disabled and blind individuals able and willing to work. Other times, however, it will need to engage one or more subcontractors to contribute niche, technical, or specialized skills to satisfy requirements under a Federal contract. Under the Commission's existing subcontracting regulation, NPAs are required to seek broad competition, inform the Commission through their CNA of multiyear subcontracts, and maximize the amount of subcontracting with other NPAs in the Program to further the Commission's mission. However, the Commission's current regulatory language regarding limitations on subcontracting to protect employment for individuals in the Program is vague and limited. For example, the existing regulatory language at subsection (c) allows NPAs to subcontract portions of production or services on the PL so long as the NPA's retained portion generates employment for individuals who are blind or are significantly disabled.<sup>6</sup> Currently, the only explicit limitations on subcontracting in the regulation are that (1) NPAs may not subcontract entire production for all or a portion of a contracting activity order without the Commission's approval and (2) NPAs must identify routine subcontracting that would be part of production of, or performance of, a PL requirement at the time the requirement is proposed for addition to the PL and subsequent Commission approval. This regulatory guidance has not been updated since 1997. In addition to the regulatory guidance, the Commission issued Operations Memorandum Number 21 in 2006 to clarify and provide some implementing guidance for approving an NPA's request to subcontract.<sup>26</sup>

## **II. Need for Rulemaking**

### **A. 41 CFR § 51-3.5 (Program Fee)**

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<sup>26</sup> See Operations Memorandum No. 21: Guidance on Nonprofit Agency Establishment of Subcontract Relationships for Current or Potential Procurement List Projects.

The Commission’s use of a cooperative agreement as the written instrument between the Commission and the CNAs complies with the visibility and transparency the GAO recommended in 2013, and the elements required by Congress in the 2016 CAA and affirmed in the Further Appropriations Act of 2024.<sup>27</sup> Furthermore, the Commission’s reliance on the regulatory framework of 2 CFR Part 200 for the cooperative agreements more properly aligns the Commission’s oversight role and the CNAs’ responsibilities with the uniform administrative requirements, cost principles, commonality of terms, business processes, and audit requirements utilized across the Federal government. This proposed rulemaking consolidates and codifies existing guidance and formalizes the use of a “cooperative agreement” as the legal instrument to satisfy the “written agreement” mandate of the 2016 CAA. This rulemaking also makes it clear that although the Program Fee is collected from NPAs, it is also an allowable cost included in the Commission’s Fair Market Price (FMP), and the final contract price.

#### **B. 41 CFR § 51-4.4 (Subcontracting)**

Subcontracting will continue to be an integral part of the AbilityOne Program, but it should never be used in a manner that diminishes the employment goals of the Program. Instead, subcontracting should be used only when it complements the employment prospects of individuals who are blind or significantly disabled and/or enhances the capabilities of an NPA in furtherance of contract performance. The proposed rule is designed to clarify the distinction between prohibited and permissible subcontracting. This proposed rulemaking clearly defines what a subcontractor is and how to calculate the percentage of subcontracting for a given project. Lastly, the rulemaking will make it easier for NPAs to leverage subcontracting on a nonroutine basis when it makes sense to do so, without incurring unnecessary administrative burdens.

### **III. Specific Proposed Changes to 41 CFR Part 51**

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<sup>27</sup> *Supra* note 5, 9, and 11; Further Appropriations Act of 2024, Pub. L. No. 118-47 (2024). The Further Appropriations Act affirmed the written agreement requirement in order for CNAs to perform requirements under the JWOD Act and to collect a fee as well as stating no less than \$3,150,000 be available for the OIG office, an increase from the CAA 2016 level that insured funding was no less than \$750,000.

## A. 41 CFR § 51-3.5

The Commission is proposing to amend the regulation governing program fee to include that the CNAs meet certain requirements prior to collecting a program fee from an NPA. Specifically, the proposed revision will require the CNAs to have a cooperative agreement with the Commission. Moreover, the cooperative agreement must be consistent with the framework of 2 CFR Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.

*Current Regulation:* Under 41 CFR § 51-3.5, CNAs may collect a fee from NPAs to subsidize the overall administration of the Program. The regulation provides that fees must be calculated based on NPA sales to the Federal customer and that the fees cannot exceed the limit approved by the Commission.

*Rationale for Proposed Change:* The proposed regulatory language revises the Commission's regulations regarding charging fees, which have not been substantively updated since its creation in 1991. The changes described here are meant to align the Commission's regulations with the controlling Federal statute, by mandating that the CNAs enter into a cooperative agreement with the Commission prior to collecting fees.

Under the first-generation cooperative agreements, only fragments of 2 CFR Part 200 were incorporated in the agreement between the Commission and CNAs. The second-generation cooperative agreements focus on what the CNAs need to run the Program, projected expenses and sales, and adjust the fee to reflect these principles. Additionally, the second-generation cooperative agreement incorporates 2 CFR Part 200 in its entirety with Commission determined exceptions, based on agency needs, requirements under federal law, and feedback from the relevant CNAs, in accordance with 2 CFR § 200.102.<sup>28</sup> Some of the specific exceptions include: limiting advertising and public relations to the costs incurred to promote the Program generally

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<sup>28</sup> See Commission Policy 51.302, Attachment B.

and enhance awareness of AbilityOne initiatives across the Federal government and the capabilities of the NPAs and participating employees (2 CFR § 200.421); bad debt incurred from an NPA's failure to remit the required program fee (2 CFR § 200.426); and contributions that are financial assistance to the NPAs in support of specific Program objectives (2 CFR § 200.434).<sup>29</sup>

The proposed regulatory language unambiguously states that the written instrument will be a "cooperative agreement." As discussed above, 2 CFR Part 200 is applicable to all cooperative agreements in its entirety, except where portions have been excepted by Federal statute, other regulations, or by the Commission in accordance with 2 CFR § 200.102(c). The above language explicitly calls out the applicability of 2 CFR Part 200 while also emphasizing that the Commission has the authority to except those parts of the regulation that conflict with how the program fee is used within the AbilityOne Program.<sup>30</sup>

These proposed regulatory changes emphasize the importance of having a cooperative agreement in place as a precondition for collecting a fee. However, it ensures that a CNA is properly compensated for expenses it incurred prior to the agreement ending and for performing Program responsibilities such as evaluating the qualifications and capabilities of the NPA and obtaining information from Federal contracting activities to help the Committee determine suitability for a requirement on the PL and establish fair market price (FMP), distributing orders from the contracting activities among its NPAs, and exploring new and emerging lines of business that will expand the Program and opportunities for individuals who are blind or significantly disabled.<sup>31</sup>

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<sup>29</sup> *Supra*, note 13 and 26. The full list of exceptions can be found in Commission Policy 51.302.

<sup>30</sup> During the second-generation cooperative agreements, the Commission worked with the CNAs in a collaborative manner to identify which portions of 2 CFR Part 200 should be excepted or amended on a case-by-case basis. All exceptions took into account the unique nature of Program Fee and the relationship of the CNAs to the AbilityOne Commission.

<sup>31</sup> 41 CFR § 51-3.2; Commission Policies 51.301 Procurement List and the NPA Selection Framework and 51.301-02 Publication, Evaluation, and the CNA Recommendations.

The primary purpose of the AbilityOne Program is to provide employment and career development opportunities for individuals that are blind or significantly disabled. CNAs are awarded a program fee based on a percentage of the sales the NPA receives from providing products or services to Federal agencies to the extent that CNAs are supporting the type of work that maximize opportunities for participating employees. The purpose of this language is to clarify that the CNA is entitled to collect fees only from the portion of the contract performed by the NPA, but not the portion that has been subcontracted to a for-profit entity. The Committee may make exceptions through policy and procedures for *de minimus* or *ad hoc* subcontracting or subcontracting opportunities that are specifically designed to support career development for NPA employees performing on AbilityOne contracts.

In some instances, it may be necessary for a CNA to serve as a prime contractor and distribute orders to an authorized NPA as a subcontractor.<sup>32</sup> Under that arrangement, the CNA would be permitted to collect a fee from the NPA subcontractor. This scenario would most likely occur when there are multiple NPAs supporting a single PL requirement, and the CNA is made prime to more easily manage orders from Federal agencies. Put another way, the NPAs are performing 100 percent of the work required under the contract, while the CNA is functionally a “administrator,” put in place to serve as a AbilityOne Program facilitator rather than as a typical prime contractor with affirmative responsibilities under the contract. There are other scenarios where the CNA may serve as prime, but has numerous responsibilities connected with contract management and performance. Under this scenario, the CNA would be responsible for negotiating its administrative expenses with the contracting activity, but it would not be permitted to collect a separate fee from NPAs serving as its subcontractors. Instead, it is assumed that the CNA has captured its administrative expenses through the course of normal contract negotiations, obviating the need to collect additional fees from the subcontracted NPAs.

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<sup>32</sup> See 41 CFR § 51-3.2(k).

*Proposed Regulation:* The proposed amendments to § 51-3.5 satisfy the written agreement mandate of the 2016 CAA for the CNA to collect a program fee and rules regarding cooperative agreements governed by 31 USC § 63 and 2 CFR Part 200. New subparagraph (a) makes it explicit that Program Fee is an allowable expense included in the fair market price approved by the Committee and the final contract price. Consistent with 2 CFR § 200.102(c), that allows a Federal agency to except some requirements to 2 CFR Part 200, new subparagraph (b) affirms the Commission's authority and flexibility to except subsections of 2 CFR Part 200 that conflict with how the fee is used within the Program on a case-by-case basis. The proposed regulation also adds new subparagraphs (c), (d), and (e) that: prohibit collection of fees if a CNA's designation has been terminated or a cooperative agreement with the Commission expires but guarantees compensation for expenses incurred during a valid agreement by allowing for collection of fees for those expenses even after termination of an agreement (proposed § 51-3.5 (c)); explain that the fee must be calculated based on actual sales of PL requirements to the Federal Government but not on any portion of work subcontracted, unless allowed by the Commission and clarify that the CNA is entitled to collect fees only from the portion of the contract performed by the NPA and not from any portion subcontracted to a for-profit entity (proposed § 51-3.5(d)); and allow the CNA to collect a fee when serving as the prime on a contract when an NPA serves as the source for the PL requirement, unless administrative or indirect costs have already been negotiated (proposed § 51-3.5(e)).

#### **A. 41 CFR §51 -4.4**

*Current Regulation:* Under Commission regulation 41 CFR § 51-4.4, subcontracting is generally permitted, but NPAs are required to select potential subcontractors through a competitive process. The regulation also requires that NPAs maximize subcontracting with other NPAs. The regulation also requires NPAs to notify the Commission of intention for routine subcontracting at the time of PL addition and requires Commission approval for any amount of subcontracting as well as any significant changes to subcontracting.

*Rationale for Proposed Change:* Subcontracting will continue to be an integral part of the AbilityOne Program, but the proposed changes are meant to better align its use with the employment goals of the Program. More specifically, subcontracting should be used only when it complements the employment prospects of significantly disabled or blind individuals and/or enhances the capabilities of a NPA in furtherance of contract performance.

While NPAs are subject to the FAR rules on subcontracting, currently, the only explicit limitations on subcontracting in the regulation are that NPAs may not subcontract entire production for all or a portion of a contract without the Commission's approval, and that NPAs must identify routine subcontracting that would be part of production of, or performance of, a PL requirement at the time it is proposed for addition to the PL, and subsequent changes to that subcontracting must have Commission approval.

The proposed regulatory language is designed to define subcontracting, clarify the distinction between prohibited and permissible subcontracting, address how subcontracting is measured, and make it easier for NPAs to leverage subcontracting on a nonroutine basis when it makes sense to do so, without incurring unnecessary administrative burdens. The proposed regulation still encourages NPAs to use competitive practices to the maximum extent practicable but removes the existing requirement for broad competition to allow NPAs to select subcontractors in a manner that is most consistent with meeting its performance objectives under the contract.

The proposed regulatory language also more clearly explains when subcontracting is expressly permissible and those circumstances where it is not. It also continues to emphasize the Commission's position that subcontracting should be used to facilitate the Program mission of employment of individuals who are blind or significantly disabled and that when subcontracting is necessary, NPAs should first look within the NPA community before considering for-profit sources.

Moreover, the existing regulation does not explicitly state how subcontracting is measured. Therefore, the proposed change is meant to explain how to do so in the case of services and

products. To lessen the regulatory burdens on NPAs, the proposed rule amends the existing regulation to reduce when an NPA must notify or seek Commission approval to subcontract, limiting it to only when it exceeds certain thresholds.

As previously noted, the primary purpose of the AbilityOne Program is to provide employment opportunities for individuals who are blind or have significant disabilities. To ensure the Commission provides appropriate Program oversight while allowing NPAs to make prompt business decisions when a small amount of ad hoc subcontracting is needed, the proposed rule now emphasizes that the notice and approval requirements largely apply only to routine subcontracting and nonroutine subcontracting that exceeds defined thresholds of greater than twenty-five percent of the direct labor hours on a Government order for services and greater than ten percent of the total value earned from Government orders for commodities.

There are many instances where an NPA may serve as a subcontractor to another NPA or a for-profit prime contractor, but it is not technically an authorized NPA for that PL requirement. In those situations, the NPA's rights and obligations are limited to the contractual agreement binding the parties. However, when an NPA subcontractor is also an authorized source, it has both contractual and Program rights and obligations. For instance, if an NPA is an authorized source, it has the right to serve as a mandatory source and may not be replaced with another subcontractor without first coordinating with the CNA and the Commission. Therefore, the proposed rule reinforces the fact that the rights and obligations of a mandatory source flow through the Committee's authorization, rather than how it contracts with a Federal agency or a prime contractor.

*Proposed Regulation:* The proposed regulatory language addresses the following not currently included in the existing regulation: (1) the definition of subcontracting as assigning or outsourcing a portion of NPAs Federal contract work to another party, (2) acceptable and unacceptable types of subcontracting and how to measure it, (3) when the Commission must be

notified and/or approve of subcontracting and subsequent changes, and (4) the rights and obligations of NPAs that serve as subcontractors on the furnishing of a requirement on the PL.

Specifically, proposed revisions to § 51-4.4(a) define subcontracting as assigning or outsourcing a portion of an NPA's Federal contract work to another party but excludes acquisition of raw or finished materials or ancillary products needed to produce or perform the PL requirement.

Proposed § 51-4.4(b) explicitly makes subcontracting permissible when it facilitates the career development or employment of individuals who are blind or have significant disabilities, and when it is used to meet niche or specialized contract requirements. It also more clearly states that the subcontracting may not be used to avoid the statutory required seventy-five percent direct labor hour ratio requirements.

The proposed rule replaces § 51-4.4(c) and (d) with more specific thresholds on subcontracting that would trigger Commission notification and approval. Specifically, the Commission proposes to establish a "*de minimis*" threshold at 10% of the government order for products and 25% of direct labor hours needed for services to for-profit entities. Any subcontracting to for-profit entities above those levels triggers a requirement for Commission notification and approval.

Proposed new § 51-4.4(e) specifies that when the amount of subcontracting to a for-profit entity exceeds a certain amount, the NPA must provide a good explanation for doing so and receive Commission approval before use of the amount of for-profit subcontracting is permitted. Moreover, the proposed rule specifies that when subcontracting with a for-profit entity is below a certain amount (twenty-five percent for services and ten percent for products), the affected NPA need only notify the Commission that it is using a subcontractor for a new PL addition or it intends to increase the level of subcontracting for an ongoing effort (proposed § 51-4.4(e)). Additionally, if routine subcontracting is intended to be a part of a provision of a PL requirement at the levels that are below the threshold described above, proposed § 51-4.4(e) requires only

notification to the Commission at the time of the requirement addition to the PL; and requires notifying the Commission before effectuation of the intent to increase the amount of subcontracting only if the increase does not exceed the *de minimis* levels described above. Lastly, proposed § 51-4.4(e) requires only notifying the Commission of routine subcontracting to other NPAs, and is subject to no *de minimis* limits.

The Commission further proposes to limit Commission notification and approval requirements by exempting any *ad hoc* or nonroutine subcontracting needed to supplement temporary workforce shortfalls or to meet a surge in government requirements, so long as it is below the *de minimis* levels described under proposed § 51-4.4(c) and (d) (proposed § 51-4.4(f)).

Finally, the Commission proposes to amend the regulation by affirming that an authorized NPA retains the same rights and obligations as any other Program mandatory source when directed to serve as a subcontractor to support a PL requirement (proposed § 51-4.4(g)).

#### **IV. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)**

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined this to be 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.

##### **A. Expected Impact of Proposed Rule**

As discussed above, since 2016 the Commission and CNAs implemented the Congressional mandate for a written agreement in order for the CNAs to collect a fee. The Commission expects the proposed regulation to create no new administrative burden. As a result, the Commission does not anticipate increased burden or cost. Moreover, the proposed regulation will help to reduce confusion as to the applicability of Program Fee and permissible subcontracting within the Program. Secondly, the Commission believes that there are potential reductions in the overall administrative burden on the CNAs and the Commission by using a uniform regulatory framework rather than the parties using an ad hoc approach each time a new written agreement is negotiated. Furthermore, the proposed changes to formally codify the use of 2 CFR § 200 will help to ensure the Commission's effective stewardship of the Program and prevent the perception of waste, fraud, and abuse as intended by Congress. Ultimately, the proposed changes to § 51-3.5 do not add any new administrative burden for the Commission or CNAs. This rule simply codifies in the Commission's regulation the existing Congressional requirement that the Commission and CNAs have been implementing since 2016.

Additionally, the proposed changes to § 51-4.4 will make it easier for NPAs to leverage subcontracting on a nonroutine basis when it makes sense to do so. As discussed above, under the current regulation, NPAs must notify the Commission or seek approval for all types of subcontracting. However, the proposed regulation reduces the requirements for NPAs to notify and seek Commission approval in part by eliminating the requirement for NPAs to seek Commission approval for all subcontracting. Instead, the proposed regulation reduces notification and Commission approval requirements for the NPAs to only when the subcontracting levels exceed a de minimis thresholds described above. The Commission expects this to significantly reduce the NPA's administrative burden and enable NPAs to make more efficient business decisions. The Commission does not anticipate any increased cost as a result of the proposed changes.

## **B. Executive Order 14192**

This proposed rule, if finalized, is expected to be an E.O. 14192 deregulatory action, as described above.

## **C. Regulatory Flexibility Act**

The Commission does not expect these proposed rules to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, at 5 U.S.C. § 601, *et seq.* These changes do not include any new reporting, recordkeeping, or other compliance requirements for small entities. These proposed rules also do not duplicate, overlap, or conflict with any other Federal rules. However, it has not yet been certified as to whether it is subject to the Regulatory Flexibility Act (5 U.S.C. § 601).

## **D. Paperwork Reduction Act**

These proposed rules do 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.

### **List of Subjects in 41 CFR Parts 51-3 and 51-4**

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 discussed in the preamble, the Commission proposes to amend 41 CFR parts 51-3 and 51-4 as follows:

**PART 51-COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED**

1. The authority citation for parts 51-3 and 51-4 are revised to read as follows:

**Authority:** 41 U.S.C. §§ 8501-8506.

2. Amend §51-3.5 by revising the existing text to be designated as paragraph (a); and adding paragraphs (b), (c), (d) and (e) to read as follows:

**§51-3.5 Program Fees.**

(a) A program fee is an allowable expense included in the Fair Market Price approved by the Committee and the final contract price with a federal agency. A central nonprofit agency may collect program fees from nonprofit agencies to facilitate its statutory responsibilities set forth in the JWOD Act and Committee regulations.

(b) Program fees collected shall not exceed the ceiling set by the Committee pursuant to section 2.2(f) of this chapter. Prior to collecting program fees, a central nonprofit agency shall enter into a cooperative agreement with the Committee, which shall be governed by 31 U.S.C., chapter 63, and Subtitle A, Title 2 Part 200, Code of Federal Regulations, subject to any exceptions approved by the Committee in accordance with 2 CFR § 200.102(c).

(c) Generally, program fees cannot be collected by a central nonprofit agency if its designation has been severed, or its cooperative agreement with the Commission expires. The central nonprofit agency may, however, collect program fees after the end of a designation or the expiration of an existing agreement if those program fees are accrued prior to the date of termination.

(d) Program fees designated under section 2.2(f) shall be calculated based on the dollar value of nonprofit agency sales of their commodities or services to the Federal Government under the AbilityOne Program, but sales of commodities and services shall not include the value or costs of the subcontracting of any part of the commodity or service, unless permitted by Committee policy or procedure.

(e) When serving as a prime contractor, the central nonprofit agency may collect a program fee from a nonprofit agency subcontractor serving as an authorized source for the underlying Procurement List requirement. It may not, however, collect a program fee if it has already negotiated general administrative and/or indirect expenses with the contracting activity for the prime contract.

3. Amend § 51-4.4 by replacing paragraphs (a), (b), (c), and (d), and adding paragraphs (e), (f), and (g) to read as follows:

**§51-4.4 Subcontracting**

(a) Subcontracting is the act of assigning or outsourcing a portion of the nonprofit agencies' obligations or tasks under a Federal contract to another party. Subcontracting does not include the acquisition of raw or finished materials to manufacture commodities or the purchase of any ancillary commodities needed to perform a service.

(b) Subcontracting is permissible when it facilitates the career development or employment of individuals who are blind or significantly disabled. It is also permissible when used to procure capabilities necessary to meet niche or specialized contract requirements. Subcontracting is not permissible when used to circumvent statutory direct labor hour ratio requirements or to outsource tasks that could otherwise be performed by significantly disabled or blind individuals. If the Committee approves subcontracting, each nonprofit agency shall accomplish the maximum amount of subcontracting with other nonprofit agencies before considering for-profit sources unless it is authorized to do so by Committee policy or procedures.

(c) *For Services.* Under no circumstances may a nonprofit agency subcontract to a for-profit entity at an amount greater than twenty-five percent of the direct labor hours needed to fulfill a government order without good cause and the Committee's prior approval. The percentage of subcontracting is determined by the number of direct labor hours performed by the subcontractor(s) in relation to the direct labor hours performed by the nonprofit agency serving as the prime contractor.

(d) *For Commodities.* Under no circumstances may a nonprofit agency subcontract to a for-profit entity at an amount greater than ten percent of the total value earned from the government order without good cause and the Committee's prior approval. The percentage of subcontracting is determined by the total contract value received by the subcontractor(s) in relation to the amount earned by the nonprofit agency serving as the prime contractor.

(e) *Notification.* Subcontracting intended to be a routine part of the production of a product or provision of a service, but less than the percentage thresholds at paragraphs (c) and (d), shall be identified to the Committee at the time the product or service is proposed for addition to the Procurement List. If a nonprofit agency intends to increase the amount of subcontracting after a requirement has been added to the Procurement List, but that amount is less than the percentage thresholds at paragraphs (c) and (d), it shall notify the Committee before the change can be effectuated. Routine subcontracting to other nonprofit agencies requires only Committee notice regardless of ratio or dollar amounts; therefore, this type of subcontracting is not subject to the conditions described at paragraphs (c) and (d).

(f) Ad hoc or nonroutine subcontracting needed to supplement temporary workforce shortfalls or to meet increased government requirements but accounting for less than the percentage thresholds at paragraphs (c) and (d) do not require prior Committee notification or approval.

(g) When a nonprofit agency, authorized in accordance with section 51-5.2(a), has been directed to serve as a subcontractor in support of a product or service on the Procurement List, it retains the same rights and obligations as any other AbilityOne mandatory source.

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