



Office of Inspector General

PHONE: 703-603-2124

2331 Mill Road, Suite 505
Alexandria, Virginia 22314-4608

October 16, 2017

MEMORANDUM

FOR: James M. Kesteloot
Chairperson
U.S. AbilityOne Commission

Tina Ballard
Executive Director

FROM: Thomas K. Lehrich *TKL*
Inspector General

SUBJECT: U.S. AbilityOne Commission Top Management and Performance Challenges Report

In accordance with the Reports Consolidation Act of 2000 (P.L. 106-531), the Office of Inspector General (OIG) is submitting what it determined to be the top management and performance challenges facing the U.S. AbilityOne Commission (Commission), for inclusion in the Commission's "Agency Performance and Accountability Report" for fiscal year 2017.

To gain their perspective, we discussed with Commission officials, including the Executive Leadership Team, challenge areas. These areas are essential to the Commission's responsibility for administering the Javits-Wagner-O'Day Act (41 U.S.C. §§8501-8506) and the AbilityOne Program.

If you have any questions, please do not hesitate to contact me.

Enclosure: Top Management and Performance Challenges Report

cc: Michael Rogers, Chief of Staff
Barry Lineback, Acting Deputy Executive Director

Top Management and Performance Challenges Report

Introduction

Enacted in 1938, the Wagner-O'Day Act established the Committee on Purchases of Blind-Made Products to provide employment opportunities for the blind. Legislation sponsored by Senator Jacob K. Javits was signed in 1971, amending and expanding the Wagner-O'Day Act to include persons with other severe disabilities. The Act, as amended, became known as the Javits-Wagner-O'Day (JWOD) Act and the Program's name became the Javits-Wagner-O'Day Program (JWOD Program). The 1971 amendments also changed the name of the federal agency to the Committee for Purchase from People Who Are Blind or Severely Disabled (CPPBSD) to reflect the expanded capabilities of the Program.

In 2006, CPPBSD changed the Program's name from the JWOD Program to the AbilityOne Program to recognize the broad positive capabilities of the program offerors. CPPBSD adopted the AbilityOne name in its title in 2011 and is now known as the U.S. AbilityOne Commission (Commission).

With a roster of 15 presidentially appointed Committee members and 31 full-time professional staff, the Commission is responsible for establishing the rules, regulations, and policy to ensure effective implementation of the JWOD Act and for the administration of the AbilityOne Program which recently exceeded \$3 billion in sales to government agencies worldwide. Goods and services providers are located in all 50 states as well as Puerto Rico and Guam and employ approximately 46,000 people.

The Program is administered by the Commission, two central nonprofit agencies (CNAs), as well as a nationwide network of qualified nonprofit agencies (NPAs). The CNAs, the aptly named National Industries for the Blind (NIB) and SourceAmerica, connect nonprofit agencies that hire persons who are blind or have severe disabilities with federal government contract opportunities. The Commission maintains and publishes a Procurement List (PL) of specific products and services which agency purchase agents can buy to help them meet their departments' mission needs. In addition, the Committee members determine fair market price (FMP) for the PL items and, when appropriate, revise the PL to keep program products and services competitive with other commercial offerings available to agencies.

The Reports Consolidation Act of 2000 (P.L. 106-531) requires Inspectors General to identify and summarize agency management challenges, as well as program successes, in an annual report to stakeholders. Using sources of information provided by the Government Accountability Office (GAO), the Department of Defense Office of Inspector General (DoD OIG), and other sources, this report represents the CPPBSD Office of Inspector General's (OIG) perspective on current Commission challenges and describes how those challenges could impact future success.

While the management challenges included here are not listed in any particular order, they do represent the most critical issues facing the Commission and the Program. In the future, the OIG will evaluate and report on management progress.

Management Challenge 1: Erosion of Statutory Program Authority

Why This Is a Challenge

The legal framework for the AbilityOne Program was created in 1938 and amended in 1971. Since that time, Congress has enacted and agencies have implemented multiple acquisition reform laws designed to modernize the way that government agencies buy goods and services. In addition, several new laws have been passed which aim to ensure our Nation's disabled veterans have expanded opportunities in government procurement contracts.

For example, Congress passed The Veterans Entrepreneurship and Small Business Development Act in 1999, the Veterans Benefits Act (VBA) in 2003, and in 2006 it approved the Veterans Benefits, Health Care, and Information Technology Act which removed important language from the VBA of 2003. Each law established procedures related to service-disabled veteran business procurement goals and requirements, but the VBA of 2006 removed clear JWOD supremacy rules that were formerly present. Additionally, Executive Order 13360 was issued to increase federal contracting and subcontracting opportunities for service-disabled veteran businesses to the detriment of Program participants.

While these programs and others like them enhance businesses opportunities for service-disabled veterans, it can often be difficult for contracting officers to navigate the complex regulations that govern them. Recent court filings demonstrate the challenges the Program faces and the confusion as to how Program rules should be interpreted and implemented.

In *Kingdomware Technologies, Inc. v. United States*, 136 S.Ct. 1969 (2016), the Supreme Court held that VA contracting officers are required to give veteran-owned small businesses (VOSB) procurement priority when there is a "reasonable expectation" that two or more VOSB will bid on the contract "at a fair and reasonable price that offers best value to the United States" (Veterans Benefits Act of 2006) (38 U.S.C. § 8127(d)). This is known as the "Rule of Two" analysis. The Court also held that this analysis was required regardless of whether the VA had already met its annual minimum VOSB contracting goals.

In *PDS Consultants, Inc. v. United States*, Case No. 16-1603C, (Fed. Cl. 2017), PDS alleged in the Court of Federal Claims that the Department of Veterans Affairs (VA) improperly implemented the Veterans Benefits, Health Care, and Information Technology Act of 2006 (Veterans Benefits Act of 2006) (38 U.S.C. §§ 8127, 8128) mandate when it revised its contracting rules in an attempt to comply with the Supreme Court ruling in *Kingdomware* while remaining compliant with the JWOD Act.

In *PDS*, the VA awarded a contract to a qualified NPA provider on the AbilityOne Procurement List without first employing the VBA's "Rule of Two" analysis as *Kingdomware* required. The VA did so because it believed that *Kingdomware* could be distinguished as applying only to competitive contracts and that JWOD procurements were non-competitive. The VA further believed that the mandatory nature of the VBA's "Rule of Two" applied only to new contracts and that here it was merely renewing a contract that existed prior to the VA's 2010

implementation of the VBA of 2006. The Court of Federal Claims disagreed with the VA, holding that the VA must conduct a “Rule of Two” analysis for all new procurement contracts before treating the AbilityOne Procurement List as a mandatory source pursuant to the JWOD Act. The Court of Federal Claims also held that because the VBA of 2006 applied only to the VA’s procurements, the VBA was a more specific statute than the JWOD Act’s broad application government-wide, and thus the VBA took precedence, regardless of the existence of a prior contract with a Procurement List contractor.

On September 1, 2017, the Court of Federal Claims stayed its decision in *PDS* pending appeal to the United States Court of Appeals for the Federal Circuit in order to resolve the issue of whether the court properly interpreted the interplay between the VBA and JWOD Act. Until this case is resolved, confusion about how to implement the two programs remains.

Additional challenges remain, and include but are not limited to:

- a. Original language from the National Defense Authorization Act for Fiscal Year 2018, Title VIII – Acquisition Policy, Acquisition Management, and Related Matters, as sent to the Senate, included provisions to allow for federal agencies to purchase products from online retailers – this language was removed from the bill before it was returned to the House for approval, but demonstrate the existence of more erosion forces in the future;
- b. Increased use by Congress to include agency-specific language in appropriation acts that require agencies to operate in a manner averse to the JWOD Act in procurement matters (“Notwithstanding any other provisions of law....”);
- c. Recommendations for changes to the AbilityOne Program and the definition of “competitive integrated employment” resulting from the report of the *Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities* established under Section 609 of the Rehabilitation Act of 1973, as amended by Section 461 of the Workforce Innovation and Opportunity Act (WIOA);
- d. Continued efforts by Randolph-Sheppard Act participants and supporters to implement its mandate to the detriment of the AbilityOne Program;
- e. Efforts by the Small Business Administration to assert its preference programs over the mandatory priority of the JWOD Act;
- f. Lack of enforcement capabilities for the AbilityOne Program to assert its mandatory source priority when federal agencies fail to purchase AbilityOne products and services;
- g. Increased legal challenges from qualified nonprofit agencies (NPAs) questioning the agency’s authority to administer the AbilityOne Program;
- h. Amplified criticism of the AbilityOne Program from disability groups which calls for changes to the implementation of the AbilityOne Program.

Progress In Addressing The Challenge

As mandated by Congress, the Commission is a member of the “Panel on Department of Defense and AbilityOne Contracting, Oversight, Accountability, and Integrity” or Section 898 Panel. (See Pub. L. 114-328, FY 2017 National Defense Authorization Act). The mandate of the Section 898 Panel includes making recommendations to Congress regarding the JWOD Act and improving the AbilityOne Program.

Additionally, the Commission will continue to work with Congress to update legislation improving the Program's statutory authority. The Commission continues to seek increased cooperation from Program participants to improve processes and controls, and to recognize the market evolution where NPAs increasingly contribute ideas for inclusion to the PL.

What Needs To Be Done

While the Commission continues its work with the Section 898 Panel and agency partners, it is vital to ensure contracting officials have a thorough understanding of the program's legal framework so that it can be implemented in a fair and effective manner.

In an effort to improve educational awareness about the program, the Commission's initiative in issuing educational materials and providing presentations to agencies, so they understand how the Program can help them meet critical agency needs, is vital.

Key Resources

1. 41 U.S.C. §8501 – 8506.
2. 41 CFR Chapter 51, Committee for Purchase From People Who Are Blind or Severely Disabled.
3. Veterans Benefit Act, 38 U.S.C. 8127(a), (d), (i).

Management Challenge 2: Lack of Adequate Resources Certainly Impacts Program Effectiveness

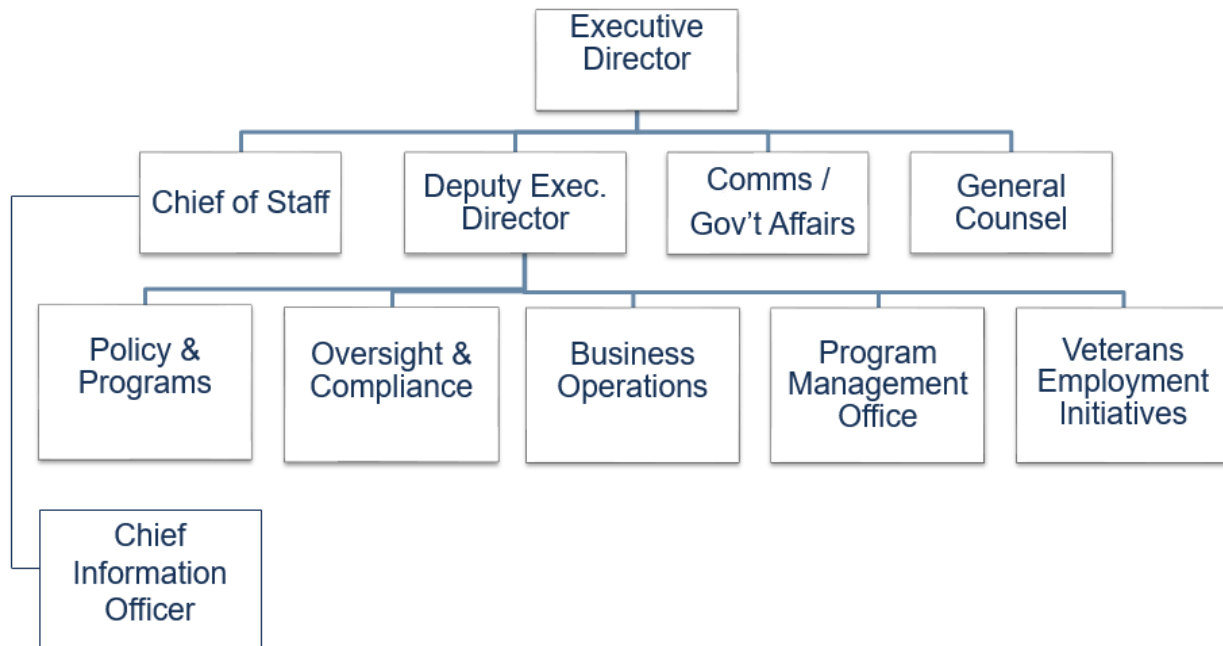
Why This Is a Challenge

The U.S. AbilityOne Commission does not have adequate staffing and resources to effectively execute its responsibilities and sustain its mission. In the long term, if adequate funding is not provided, budget pressure could impact the Commission's capacity to ensure program accountability and operational efficiency.

Currently, the Commission operates with a staff of less than 31 people who are responsible for administering a \$3 billion program with locations in all 50 states, as well as Puerto Rico and Guam. Its resource levels are not comparable to the geographical size and complexity of the program it oversees, so the Commission is seeking remedies to these problems by working with the Office of Management and Budget (OMB) and Congress.

In attempting to meet the Agency Reform Plan requirements, as prescribed by OMB in Memorandum M-17-22, the challenge for the Commission is to be able to operate effectively despite funding shortages, which negatively impact its ability to properly administer the AbilityOne Program.

U.S. AbilityOne Commission Staff Organizational Chart



Progress In Addressing The Challenge

The Commission conducted a comprehensive review of its nonprofit agencies (NPAs) compliance structure and processes which led to the conclusion that both needed reform. As a result, in FY 2017, the compliance review process was enhanced with the establishment of additional delineated procedures and, as outlined in the House Committee on Appropriations Report language, with a greater focus on the importance of complying with direct labor hour ratio requirements. Lastly, the Commission continues to evaluate considerations for its field office location, including its proximity to nonprofit agencies, cost of living, GSA rental space options, and access to travel.

What Needs To Be Done

The Commission should continue to focus on integrating its risk management with its strategic planning. Continued focus on key agency restructurings or work-process redesigns will help the Commission promote favorable economic conditions, manage diverse activities, and properly respond to Congressional mandates.

Key Resources

1. Committee House Appropriations Report 115-224 at 133, accompanying the Funding Bill for Fiscal Year 2018 for programs within the Department Labor, the Department of Health and Human Services, Department of Education, and other related agencies.
2. OMB Memorandum M-17-22, *Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce* (April 12, 2017).

Management Challenge 3: Enhancement to Program Compliance

Why This Is a Challenge

Currently, AbilityOne providers are assessed by the Commission's Oversight and Compliance Office (Office) to ensure program qualification requirements are met pursuant to Title 41 CFR 51-4. Conducting reviews for over 500 nonprofit agencies (NPAs) with more than 46,000 employees, the Office is tasked with providing assurance that the CNAs and NPAs are adhering to all of the Program's legal and regulatory requirements.

By reviewing annual NPA certifications and conducting onsite inspections, the Office staff provides program accountability. Inspections involve the review of company health and safety standards, direct labor hour ratios, and compliance. Currently, the resources for this directorate include four (4) staff who are responsible for issuing policy guidance, conducting inspections, reviewing annual certifications and conducting training for NPAs participating in the AbilityOne Program. Due to budget constraints and increasing responsibilities, the Office may be unable to meet its assurance goals without additional resources.

Progress In Addressing The Challenge

The Commission's Oversight and Compliance Office has made notable advancements, including enhancements to its structure and procedures. For example, it hired a new director, implemented virtual NPA documentation assessments, and placed additional emphasis on streamlining the compliance and standardization processes. Further, the importance of training and robust communication is being reiterated to Program participants. However, without the development and use of a risk-based model to help inform compliance efforts, it will be difficult to ensure that the already scarce resources are being used in the most efficient and effective manner.

What Needs To Be Done

The Commission should develop a risk-based management approach for deploying resources devoted to program compliance and continued improvement processes, standardize training, and implement an automated documentation system. Because each NPA is different, the Office should begin to seek ways to implement a risk-based compliance approach based on quantifiable or identifiable factors such as contract volume, dollar value, and product or service risk profile.

Key Resources

1. 41 U.S.C. §8501-8506, Javits-Wagner-O'Day (JWOD) Act.
2. 41 CFR Chapter 51, Committee for Purchase From People Who Are Blind or Severely Disabled.
3. House Committee Appropriations Report 115-224 at 133, accompanying the Funding Bill for Fiscal Year 2018 for programs within the Department Labor, the Department of Health and Human Services, Department of Education, and other related agencies.
4. National Defense Authorization Act for Fiscal Year 2017, Title VIII – Acquisition Policy, Acquisition Management, and Related Matters.

Management Challenge 4: Establish an Enterprise-wide Risk Management Framework

Why This Is a Challenge

Currently, the Commission does not have a formal, enterprise-wide framework to identify, analyze, and manage risk. In July 2016, the Office of Management and Budget (OMB) issued an update to OMB Circular A-123 requiring federal agencies to implement Enterprise Risk Management (ERM) procedures so executives can ensure the achievement of agency strategic objectives. Like other agencies, the Commission is required to align ERM processes with its goals and objectives and communicate and report on each of the identified risk areas. Presently, the Commission has limited ability to identify and respond to critical issues or address unbalanced statutory requirements.

Progress In Addressing The Challenge

While the Commission does not have a formal ERM process in place, it has addressed specific program risks through its implementation of the provision contained in the Consolidated Appropriations Act of FY 2016, which required the establishment of written agreements with CNAs to improve program accountability and decrease risk.

What Needs To Be Done

The Commission needs to implement the ERM development and implementation requirements included in OMB Circular No. A-123. While OMB recognizes that not all components of an ERM process are fully operational in the initial years, Agency leadership must set priorities in terms of implementation consistently with the OMB-required policy changes.

Key Resources

1. Office of Management and Budget (OMB) Memorandum M-16-17 for Circular No. A-123, *Management's Responsibility for Enterprise Risk Management and Internal Control* (July 15, 2016).
2. House Committee Appropriations Report 115-224 at 133, accompanying the Funding Bill for Fiscal Year 2018 for programs within the Department Labor, the Department of Health and Human Services, Department of Education, and other related agencies.