

How AbilityOne Bid-Protest Case Clarifies GAO's Limits

By **Aron Beezley**

The U.S. Government Accountability Office, in the recent bid protest decision *Team Wendy LLC*, clarified the scope of its authority to review protests involving the addition of products or services to the AbilityOne procurement list.[1] As discussed below, the GAO's decision in this case provides important guidance to protesters, intervenors and procuring agencies alike.



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What is the AbilityOne program?

In 1938, Congress created a program pursuant to the Javits-Wagner-O'Day Act that was intended to provide employment opportunities for persons who are blind.[2] In 1971, Congress expanded the program to include persons with severe disabilities.

Now known as the AbilityOne program, the program's public-private structure consists of the federal, independent AbilityOne Commission to oversee the program, two central nonprofit agencies — SourceAmerica and the National Industries for the Blind — to administer much of the program and hundreds of qualified nonprofit agencies employing persons who are blind or severely disabled to provide products and services to federal agencies.

Under the program, the AbilityOne Commission has the exclusive authority to establish and maintain a procurement list of supplies and services provided by the qualified nonprofit agencies. The JWOD Act states that the AbilityOne procurement list is the mandatory source for federal agencies for any good or service on that list.[3]

What are the key facts of the bid protest?

In *Team Wendy*, the GAO protester argued, among other things, that the procuring government agency engaged in improper exchanges with the National Industries for the Blind by requesting the addition of another company's product to the AbilityOne procurement list. The protester also contended that these exchanges were "an improper attempt to procure [the other company's product] on a sole-source basis."

Before examining the merits of the protester's arguments in this regard, the GAO noted the following:

GAO will not consider protests challenging the AbilityOne Commission's determination regarding items to be included on the procurement list, as such determinations are within the exclusive authority vested in the Commission to establish and maintain the list in accordance with the overall purpose of the JWOD Act. See *Goodwill Indus. of the Valleys*; *SourceAmerica*, B-415137, Nov. 29, 2017, 2017 CPD ¶ 369 at 5 n.8; *Microform Inc.*, B-246253, Nov. 13, 1991, 91-2 CPD ¶ 460 at 2; *Abel Converting, Inc.*, B-229581, Mar. 4, 1988, 88-1 CPD ¶ 233 at 2-3. In contrast, our Office will address the merits of protests challenging a procuring agency's actions in the context of the JWOD Act and its implementing regulations. For example, we will review whether a procuring agency has met its obligation to procure products from the procurement list or is improperly procuring products that are not on the procurement list. See, e.g.,

Goodwill Indus. of the Valleys; SourceAmerica, supra; Integrity Nat'l Corp., B-411582, Sept. 1, 2015, 2015 CPD ¶ 278; National Indus. for the Blind, B-409528.20, July 2, 2014, 2014 CPD ¶ 204; Alternative Contracting Enters., LLC; Pierce First Med., B-406265 et al., Mar. 26, 2012, 2012 CPD ¶ 124; OSC Solutions, Inc., B-401498, Sept. 14, 2009, 2009 CPD ¶ 185.

In light of the foregoing, the GAO then held that the decision at issue by the NIB to propose the other company's product for addition to the AbilityOne procurement list is not a matter that the GAO will review. Similarly, the GAO held that the decision by the AbilityOne Commission to accept the recommendation by the NIB regarding the addition of the product to the AbilityOne procurement list is not a matter that the GAO will review.

The GAO then went on to clarify that:

For purposes of determining whether [the GAO] will review a challenge concerning the addition of a product to the AbilityOne procurement list, we see no difference between an agency's request to add a product and the AbilityOne Commission's review of that request. We conclude these matters are either specifically authorized for procuring agencies or committed to the discretion of the AbilityOne Commission under the JWOD Act and its implementing regulations.

Such being the case, the GAO went on to hold that, regardless of the procuring agency's reason for requesting that the NIB recommend the addition of the other company's product to the AbilityOne procurement list, "these actions are not matters that [the GAO] will review as they are matters committed to the discretion of the AbilityOne Commission and its designated [central nonprofit agencies]." The GAO, therefore, dismissed the subject protest arguments.

What are the key takeaways?

The GAO's recent decision in Team Wendy provides important clarification on the GAO's authority to review bid protests involving AbilityOne procurements.

In particular, the GAO reiterated that it generally will not consider bid protests challenging the AbilityOne Commission's determinations regarding items to be added to the AbilityOne procurement list because such determinations are "within the exclusive authority" vested in the AbilityOne Commission "to establish and maintain" the AbilityOne procurement list "in accordance with the overall purpose of the JWOD Act."

The GAO clarified, however, that it will address the merits of bid protests challenging a procuring agency's actions in the context of the JWOD Act and its implementing regulations. For instance, the GAO noted that it will review bid protests questioning "whether a procuring agency has met its obligation to procure products from the procurement list or is improperly procuring products that are not on the procurement list."

Protesters, intervenors and procuring agencies alike would be wise to familiarize themselves with the GAO's noteworthy decision in this case.

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[1] See Team Wendy LLC, B-417700.2 (Oct. 16, 2019), <https://www.gao.gov/products/B-417700.2#mt=e-report>.

[2] See 41 U.S.C. § 8502.

[3] *Id.*, § 8504(a).