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The Special Counsel

June 30, 2022

Kimberly Zeich
Acting Executive Director & Chief Executive Officer
U.S. AbilityOne Commission
355 E Street S.W., Suite 325
Washington, D.C. 20004

VIA ELECTRONIC MAIL

Re: OSC File DI-22-0590

Dear Ms. Zeich,

I am referring to you for investigation a whistleblower disclosure that officials at the U.S. AbilityOne Commission ("Commission") may have engaged in conduct that constitutes a violation of a law, rule, or regulation; gross mismanagement; and possibly a gross waste of funds. A report of your investigation, including any remedial actions if warranted, is due to the Office of Special Counsel (OSC) by August 29, 2022.

The Commission, formerly known as the Committee for Purchase from People Who Are Blind or Severely Disabled, is an independent federal agency that administers the AbilityOne Program ("AbilityOne")—one of the largest sources of employment for blind and severely disabled workers in the United States.[1] Through AbilityOne, approximately 400-500 Nonprofit Associations ("NPAs") that train and employ blind and severely disabled individuals receive nearly four billion dollars in federal contracts every year.[2] The Javits-Wagner-O'Day Act ("JWOD") establishes qualifications for NPAs to participate in AbilityOne; key among them is that an NPA have blind or other severely disabled individuals complete "at least 75 percent of the hours of direct labor required [("direct labor requirement")] for the production or provision of the products or services [on any contract awarded through AbilityOne ("JWOD Contract")]."

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[1] The Commission, which is supposed to have 15 presidentially appointed members, currently has only seven members, three of whom are from federal agencies and four of whom are private citizens ("the Committee"), and twenty-six federal employees. The Commission contracts with two non-governmental Central Nonprofit Agencies ("CNAs"), National Industries for the Blind and SourceAmerica, to allocate JWOD Contracts to the various NPAs. The CNAs work with the Commission to routinely (approximately every 12-18 months) inspect the NPAs to ensure their compliance with JWOD Contract requirements.

[2] Through these contracts NPAs provide various products and services for numerous federal agencies, including manufacturing military uniforms, helicopter pins, and rubber stamps; landscaping at military cemeteries; loading ships; participating in phone-banking; and providing janitorial work.

The whistleblower, [redacted], who consented to the disclosure of his name, is a Compliance Specialist at the Commission. The whistleblower alleges that various federal agencies, through the AbilityOne program, are paying over one hundred million dollars in federal contracts to NPAs that fail to qualify for these dollars. The specific allegations to be investigated include the following:

- A significant number of NPAs receiving federal contracts through AbilityOne are currently failing to meet basic JWOD Contract requirements, like proving that blind or severely disabled workers perform 75 percent of their direct labor, as required by law.
- The Commission lacks appropriate policies or standard operating procedures to prevent or address violations of JWOD Contract requirements.
- Two of the Commission's Committee members, who are responsible for overseeing AbilityOne and acting when an NPA fails to comply with legal requirements, are Chief Executive Offers (CEOs) at NPAs that currently receive contracts through AbilityOne, creating an apparent conflict of interest. Further, one of those NPAs, LightHouse for the Blind and Visually Impaired of San Francisco ("LightHouse"), according to Committee records, has been failing to comply with AbilityOne requirements since 2019 but has received over $7 million through JWOD contracts since then.
- The Commission's FY2021 Performance and Accountability Report to Congress was inaccurate in its statement that 86 percent of NPAs in the AbilityOne Program are in compliance with the JWOD 75-percent direct-labor-ratio requirement.

The Committee is legally required to investigate and consider action as to any "alleged violation" of JWOD Contract requirements by an NPA.[3] The NPA's failure to correct its violation may result in termination of eligibility to participate in the AbilityOne Program. Commission Policy 51.409 § 6(b) further states that "NPAs that fail to maintain qualification . . . will be placed in 'deauthorized' status in the Commission's records."

According to the whistleblower, the Commission lacks a policy or standard operating procedure governing the mandated inspection process and addressing an NPA's noncompliance. He further contends that, where the Commission has found noncompliance by an NPA, it has failed to meaningfully require that the NPA correct its violations. Based on his review of inspection records for 120 NPAs, the whistleblower alleges that 54 NPAs (45 percent) failed to meet the basic JWOD Contract requirements at their annual inspections. Seven of them had been failing for over a decade, but nonetheless collectively received over $55 million in JWOD contracts during that time; and seven did not qualify as nonprofit entities at all, according to Internal Revenue Service (IRS) records and annual tax filings, but nonetheless collectively received approximately $85.6 million in JWOD contracts during the time.[4]

[3] 41 C.F.R. § 51-4.5.
[4] The whistleblower alleges that the CNAs and the Commission fail to monitor the NPAs' nonprofit statuses at annual inspections.

In addition, the Commission failed to take appropriate corrective action, according to the whistleblower, after two blind employees at NPA Arbor Products, Inc., complained that the NPA was falsely reporting that 100 percent of its direct labor hours were completed by the two blind employees and that the SourceAmerica inspection visit in 2016 was "staged" to hide the fact that non-disabled workers were instead performing the work. The blind workers also asked for more adaptive equipment to increase safety, accessibility and productivity, but said they were told that funds were not available even while money was spent on another family business, cars for family members and ski trips.

AbilityOne emails show that the AbilityOne Compliance Officer sent the complaint to the Director of Compliance and that Commission leadership later wrote that they should have held an unplanned visit to verify the blind workers' claims but did not have a policy or procedure in place to do so.[5] According to the whistleblower, no action was taken and, since 2017, Arbor Products has earned more than $4.3M in JWOD contracts sales.

Finally, the whistleblower disclosed that two of the Commission's Committee members are CEOs at NPAs that currently receive contracts through AbilityOne, creating an apparent conflict of interest. [redacted], the Chief Executive Officer of LightHouse in San Francisco, California, and [redacted], the Chief Executive Officer of AtWork! in Bellevue, Washington, joined the Committee in October 2021 but remain the CEOs of their respective NPAs. According to the whistleblower, there is no policy that prohibits this. The whistleblower also alleges that, according to Commission records, LightHouse has failed JWOD inspection visits since 2019 but was awarded over $7 million in JWOD contracts during that time.

Pursuant to my authority under 5 U.S.C. § 1213(c), I have concluded that there is a substantial likelihood that the information provided to OSC discloses a violation of law, rule, or regulation; gross mismanagement; and a possible gross waste of funds. Please note that specific allegations and references to specific violations of law, rule, or regulation are not intended to be exclusive. If, in the course of your investigation, you discover additional violations, please include your findings on these additional matters in the report to OSC.

As previously noted, your agency must conduct an investigation of these matters and produce a report, which must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the report, along with the whistleblower's comments and any comments or recommendations I may have, to the President and congressional oversight committees and making these documents publicly available.

[5] According to the whistleblower, this lack of response is in contravention of Commission Policy 51.410 which states: "The Commission will investigate and process complaints it receives from employees of NPAs, coordinating with the Office of Inspector General (OIG) in accordance with the Inspector General Act of 1978, as amended (IG Act)."

The appendix contains important legal requirements and details for the investigation and report. My staff is available to discuss the questions I am submitting for investigation, clarify the requirements, or consider any request for an extension of the report deadline. The primary point of contact for this case is Elizabeth McMurray, Chief, Retaliation and Disclosure Unit. You may reach Ms. McMurray at (202) 804-7089 or emcmurray@osc.gov.

Sincerely,

Henry J. Kerner
Special Counsel

Enclosure

cc: The Honorable Stefania Pozzi Porter, Acting Inspector General, U.S. AbilityOne Commission Office of Inspector General

APPENDIX
AGENCY REPORTS UNDER 5 U.S.C. § 1213

GUIDANCE ON 1213 REPORT

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- Should the agency head delegate the authority to review and sign the report, the delegation must be specifically stated and include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5).
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here: https://osc.gov/PublicFiles. Please refer to our file number in any correspondence on this matter.

RETALIATION AGAINST WHISTLEBLOWERS

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

EXCEPTIONS TO PUBLIC FILE REQUIREMENT

OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

EVIDENCE OF CRIMINAL CONDUCT

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report with the whistleblower or make it publicly available. See 5 U.S.C. §§ 1213(f), 1219(a)(1).