

**Review and Proposed Solution to Harmonize the Abilityone Program with the
Workforce Innovation and Opportunities Act (WIOA) and Increase the
Opportunities for People who are Disabled and Small Business.**

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1.0 INTRODUCTION

AbilityOne (AB1) is the brand name of the program authorized by the Javits, Wagner, O'Day (JWOD) Act, which was originally passed in 1938 and refreshed in 1971. The intent of JWOD was to authorize a special preference in government contracting for nonprofit sheltered workshops that train and employ people with disabilities. Nonprofits maintain their status in the program and the highest priority in federal contracting if they provide 75% of the direct labor on the products or services contracted for with people with disabilities. The program is broken into two sections- SourceAmerica (formerly the National Industries of Severely Handicapped), and the National Industries for the Blind or (NIB) affiliates. Within the program, there are preferences for people who are blind for supplying products to the federal government, but that preference is second to the Federal Prison Industries (FPI) (see FAR Part 8.6 and FAR Part 8.7 generally).

Once a requirement is identified by AbilityOne for supply to the federal government, the Central Nonprofit Agencies (CNA) consisting of NIB and SourceAmerica, will work with the AbilityOne Commission (Commission) (formerly the Committee for the Purchase of From People Who are Blind or Severely Disabled), to add the requirement to the Procurement List. Following Administrative Procedure Act (APA) direction, a requirement is assessed for "suitability" in accordance with the authorizing statutes by the Commission. The Commission has extraordinary discretion to determine the satisfaction of those suitability requirements (for instance no rule making has been done to determine what "adverse impact on the incumbent" means, rather, it is a rule of thumb determination by the Commission). Once the suitability is determined, the Commission publishes its intent to add a requirement to the Procurement List in the Federal Register. Upon the conclusion of the comment period, the Commission will evaluate the comments, record of information from the affiliated CNA and nonprofit to determine suitability. If suitability is deemed proper, the requirement is added to the Procurement List. Thereafter, government buyers *must* purchase items from the Procurement List before using any other means of purchasing.

The AB1 program has grown and changed significantly over the years. Currently, government customers spend over \$3 billion to purchase products and services provided by nonprofits affiliated with NIB and SourceAmerica (based on the FY 2015 report by the Commission, the last document recording overall program sales) making the program the largest employer of people with disabilities in the nation. Moreover, for the privilege of participating in the program, those nonprofits must pay a fee of just under 4% for all contract revenue to NIB and SourceAmerica (about \$130 million annually) for program "management" on behalf of the Commission.

Prices charged to government customers are set by the Commission which is the ultimate arbiter of the “fair market” prices, though in many cases, those prices are significantly higher than otherwise found in the commercial marketplace. Justifying the higher prices, AB1 nonprofits claim the need to use disabled labor (more on that later), which requires higher management and more oversight than commercial organizations and with less productivity (one of the reasons AB1 nonprofits have used sub-minimum wage labor as well due to productivity reductions).¹

The largest customer of AbilityOne nonprofits by far is the Department of Defense (DOD). Reform for the program, which is in need of greater oversight, would be best served coming from the DOD and it is the intent of this paper to highlight many of the issues with the program and how these issues can be addressed in a way that will not harm those served by these programs. Rather, DOD can increase Competitive and Integrated (CI) opportunities for those in the program, and ultimately, increase competition in a changing budget environment, allowing the DOD greater flexibility in sourcing and how it meets its mission. It is obvious that if the reforms begin at DOD, the same benefits can be applied across the entire Federal Government which is required to purchase items under JWOD with the same priorities afforded DOD customers.²

The purpose of this document is to assist all stakeholders in meeting the changing needs of the program through understanding the structural dynamics in the program (bifurcation between industries and training programs), focus on preserving the training programs within JWOD, making the industries focused on employment compliant with WIOA, and affording a broader base to employ people with disabilities in a dynamic market. The end goal is to preserve the best parts of AbilityOne while updating the programs key components to meet the modern regulatory and work environments.

¹ It should be noted that what is not discussed is the level of turnover in the disabled workforce, and how that affects productivity as opposed to commercial businesses. In fact, while productivity might be less in AB1 programs, many of the programs are able to maintain a much more stable workforce which dilutes the “productivity gap” where commercial businesses must hire, train and handle high turnover in the positions typically provided by AB1 projects.

² The only area where JWOD has been overruled as a priority to a Federal Government agency is with the Department of Veterans Affairs (VA), the subject of a recent court ruling in *PDS Consultants v. the United States*. Nonetheless, the solutions in Section 4.2 below can apply to VA contracts as well through the employment of the nonmanufacturer rule in FAR 19.102(f) and how it applies to VA’s set aside program.

2.0 THE WORKFORCE INNOVATION AND OPPORTUNITIES ACT AND JWOD- A NEED TO HARMONIZE TWO OPPOSING REGULATIONS.

AB1 served a purpose throughout its history of providing employment training and opportunities to people with disabilities in a sheltered and segregated environment. The mandate for 75% direct labor is the key component to the program. When started, many of the organizations supplying products and services through AB1 were small “workshops,” focused on limited commercial opportunities such as manufacturing brooms, mops and providing janitorial and related low-skill labor to government customers.³

Since that time, a higher percentage of the business that goes to the program consolidated to fewer nonprofits, meaning a very small percentage of organizations control the majority of the business and the large pool of nonprofits peripherally participating (smaller ones) are marginal in terms of the level of business performed under AB1.⁴ Moreover, the opportunities have (to a limited extent) become more complex (facility management on military installations and vehicular maintenance for instance that SourceAmerica focuses on).⁵ Many of the nonprofits that have expanded greatly are more like corporations and less like those charity-focused nonprofits which the program was created to assist (with compensation to executives matching the new complexity of the organizations). The percentage of funds used to support the program from State Workforce Programs, the actual referrals from State Programs, and donations have become irrelevant relative to the revenue generated by the AbilityOne contracts with the federal government.⁶

Seeing the mismatch of AB1 and the need to increase CI opportunities, in 2016, the Department of Education (DEd) published its rules for the Workforce Innovation and Opportunities Act (WIOA), focusing on the future of defining programs designed to assist people with disabilities through employment and those focused on training those

³ In fact, many organizations were State-run facilities where people with disabilities were housed, trained and cared for. Others were charitable organizations which had a “work activity” program designed to provide people with disabilities the opportunity to have some vocational training or activity during the day. These programs were not designed to be the industries that have evolved.

⁴ The bifurcation dynamic is especially evident in how smaller nonprofits are foregoing AB1 contracts because they cannot afford to perform the contracts anymore (WIOA funds and minimum wage requirements for instance are major concerns), and thus, the AB1 business is not material to the financial health of the organization.

⁵ We argue that the opportunities offered by the majority of AB1 contractors are limited in scope and not in line with the modern work environment. In many instances, the ability to perform these “complex” requirements are a result of the revisions to the definition of “disabled” as discussed below.

⁶ See IRS 990 forms for the largest NIB nonprofits, L C Ind (LC Industries), Industries for the Blind, Milwaukee, and IFB Solutions. Each will demonstrate the financial dynamic we speak about.

people with disabilities. Essentially, WIOA intends to separate the two functions which currently are combined under JWOD.

The WIOA rules explicitly called out JWOD as not being CI, and as a result, cut off funds from State Programs to be used to support and refer people to the JWOD opportunities for employment.⁷ Effectively, the largest source of funding for workforce training shut off funding to these AB1 workshops because they are sheltered and segregating due to the inclusion of 75% direct labor as a requirement to operate under the program's rules. Of equal concern is referrals from State programs for people with disabilities are no longer approved for JWOD programs, effectively removing the main source of employees for project fulfillment and long-term sustainment.⁸

The effect is actually materially affecting the smaller AB1 programs which are at their core, training organizations. Those affected organizations are "vacating" their AB1 contracts due to the reliance on WIOA funds and referrals as opposed to those industries that depend on contract revenue and obtain referrals from internal recruiting.⁹ Therefore, those DOD facilities dependent on AB1 contractors will soon see effects as those requirements will need to be contracted out and potentially to organizations that are not focused on supporting people with disabilities. Furthermore, as WIOA cuts referrals further, staffing existing opportunities will be made more difficult in the future unless DOD begins to address these issues.

WIOA's effect on the AB1 workforce will also be seen in the increased calls for redefining (or defining more clearly) "disabled" under the AB1 program. In recent years, the definition of "disabled" for SourceAmerica has begun to shift towards a more liberal definition as opposed to the traditional definitions found in the JWOD laws. According to JWOD, the definition of disabled is not tied to any formal designation (such as Social Security or VA), rather, it is defined by the nonprofit performing the contract but it is supposed to be so servers as to limit employment in the competitive workforce. Alternatively, the definition of legally blind is far more concrete.

⁷ The effects of these rules have been swift in that more than 20 states have already stopped referrals of people with disabilities to AbilityOne nonprofits.

⁸ While internal recruiting may be able to address these problems to a limited extent, the problem is that the recruiting will open up questions regarding the propriety of only recruiting people with disabilities for a specific program function (constitutionality), as well as whether the stigma of the sheltered workshop can be shed in the process. Moreover, can the fact the Agencies are internally recruiting for industrial-like jobs as opposed to receiving referrals begin to break down the notion that they are nonprofits designed to assist in the training of people with disabilities and thereby break down their IRS 501(c)3 status?

⁹ There are effects however on those larger nonprofits in that they are still having difficulty recruiting for positions to meet their AB1 contractual needs and they are not able to go to State Program referrals to offset those difficulties.

SourceAmerica and the Commission have collaborated to switch the definition of disabled to “significantly,” as opposed to severely in an effort to afford more flexibility in the definition of “disabled,” a clear example of the extraordinarily wide discretion available to those in the program. The result is that many without government “certified” disabilities are being employed to perform JWOD contracts with the DOD. WIOA panels have called specifically for “certified” disabilities to be assessed, a requirement that could significantly affect the performance of contracts by SourceAmerica for the DOD.

3.0 DATED BUSINESS MODEL

Another factor is the business model itself that AB1 relies on. AB1, particularly NIB, relies on supplying individual items, in what we call a “products” model. The government, however, has moved to what we call a “projects” model using “prime vendors” and Lead Systems Integrators to aggregate procurement and delivery of products supplied under AB1 now. The origins of NIB’s model is when DOD/GSA stocked and maintained inventory of products for usage, particularly the items NIB sells. While GSA may have authority of many of the items, the DOD is the biggest customer.

NIB and to a lesser extent SourceAmerica, rely on individual items (pens, paper, et cetera) purchased by the DOD. If the item is supplied indirectly (for example through a third party), that item must still be the AB1 item on the Procurement List (but problems with the Essentially The Same or ETS compliance creates tremendous confusion between regulation and practice). Thus, the system is Byzantine in its own right in that DOD must police its contractors aggregating procurements to ensure individual items are in compliance with JWOD- effectively defeating the ease that aggregation should bring. Essentially, JWOD creates another administrative burden for the purchasers, suppliers and end users to determine whether the item is on the Procurement List and which nonprofit it must purchase the items from. We feel that JWOD thus limits DOD to efficiently move to a “projects” model to allow single solutions to meet its needs for the majority of the items provided. To the extent it is happening, there are a lot of steps involved, administrative burden, and mark-ups paid.

3.1 LACK OF COMPETITION/INNOVATION

More important is that AB1 and JWOD is stifling in that organizations are limited by their “ratio,” instead of productivity. In other words, the incentive is to be as “labor heavy” as possible for projects to allow for the organization to continue to meet its 75% direct labor requirements. Being labor heavy means efficiency is not rewarded, nor are government customers able to share in cost savings or product innovations. Instead, the programs employ the highest number of people at the lowest wages (minimum) to provide requirements as they have been done historically.¹⁰ Moreover, since the 75% direct labor is so critical to the organization overall, the incentive is to keep employees and

¹⁰ The dynamic of the high employment/low wages is also a factor in refreshing for recruitment of people with disabilities, particularly in the blind community. Since the opportunities are limited in terms of workforce training, and many people with disabilities now have accommodations allowing for higher education, the opportunity/supply mismatch is a problem (highly educated people doing assembly-line employment).

focus on business opportunities to maintain those positions instead of providing upward mobility or updated career opportunities to employees with disabilities since the program does not reward such situations.¹¹

It is this disincentive to upward mobility and modern work skills that is the most glaring flaw of the program as it exists. The repeated Shibboleth of the high unemployment, particularly in the blind community, is demonstrative of the need for AbilityOne according to those involved in the program. However, while NIB and its affiliates are significant employers of people who are blind, their efficacy in providing upward mobility as opposed to the non-NIB affiliated workforce leaves a lot to be desired (note how many senior executives are disabled and running AB1 nonprofits). In fact, the essential problem is the mismatch between the employment opportunities available under AB1 and those that people want to perform, not that there are not enough opportunities altogether. NIB routinely asks the Commission to waive the 75% direct labor ratio for agencies as they go below to use non-disabled labor to supplement opportunities because there is not enough willing labor available. The essence of the mismatch is found in the lack of incentive alignment with the intent of WIOA for the AB1 program participants.

3.2 MINIMUM WAGES

Another major factor affecting AB1 is the inclusion of minimum wage ordinances, both locally and nationally. There are still SourceAmerica nonprofits that have minimum wage “waivers,” and as minimum wages are being required to continue performance in the AB1 program, more opportunities and requirements will become unsustainable. Furthermore, as stated above, the disincentive to find efficiency because of the need to employ more people to meet ratio becomes a clear issue. As you can imagine, the more difficult it is to fill opportunities, the more opportunities need to be let go. As more opportunities are foregone, ratio falls, thus predicating more opportunities to be foregone again. It is a downward cycle that can occur quickly since AB1 nonprofits must manage two bottom lines- direct labor ratios and cash.

3.3 NEED TO INTRODUCE INTERNAL INCENTIVES TO DRIVE NEW OPPORTUNITIES

¹¹ A good discussion of direct labor, how important it is to ratio and how ratio is judged is found in the following Court decision, *Akima Intra-Data v. the United States*:
http://stanhinton.com/2014_CoFC_Protests/FIRESTONE.AKIMA122314.pdf

The DOD (or the broader government) can be a crucial driver in changing the incentives for AB1 nonprofits- moving away from direct labor to upward mobility and greater/broader opportunities for people with disabilities. Incentivizing overall workforce employment instead of direct labor will open competitive opportunities in an integrated environment. By creating a new set aside category as outlined in Section 4.2 to reward organizations meeting a social purpose, DOD can drive a greater mission alignment and provide people with disabilities new opportunities and incentivized organizations for employment growth.

4.0 WHAT CAN BE DONE?

We see the currently paradoxical situation at a tipping point for DOD and JWOD/AB1, where reform can be brought into the picture by AB1's largest customer. Underlying it all is the fact AB1 serves a clear mission- to provide employment training to people with disabilities. However, that mission continues to evolve into the fact AB1 now provides sustained employment opportunities as well for people who are blind or severely disabled. The fact the largest employment program for people with disabilities is opposed to WIOA is a major issue and unreconcilable. It is essential that employment be separated from training. Therefore, we propose the following to formalize that separation.

4.1 ALIGN JWOD WITH WIOA

The fact JWOD and WIOA are diametrically opposed is something to be addressed. DOD's long-term dependence on and support of a program which is segregating employees based on disabilities and against the intent of WIOA is a very bad signal to the disability community and Congress intending to drive CI employment.

Having said that, JWOD can serve its original purpose - to be a limited training program - and provide people with disabilities the skills to enter the CI workforce. Moreover, we believe that the CI piece is another crucial factor in the success of any new efforts on the part of DOD to support employment opportunities for people with disabilities.

4.2 CREATE A SOCIAL ENTERPRISE SET ASIDE

The centerpiece of any resolution to these structural issues is to create a Social Enterprise Set Aside, administered by the SBA or some similar group (SBA has the necessary expertise and programmatic frameworks to implement such a set aside program). The program can be modeled on the HUBZone Program (where the workforce meets a certain percentage, but not tied to "direct labor") and the 8(a) program (for how the program is managed).

Social Enterprises formerly of AB1 would be required to meet certain requirements, but can continue to provide their requirements. The essence is the set aside program would function like others (it is a competitive marketplace for winning requirements on a contract cycle (i.e. every 5 years) versus JWOD now), and between those that meet the requirements to participate in the set aside category.

The suggested points are to try and synthesize many different stakeholders and ensure key concerns of the various groups and governmental studies are incorporated in the process (employees under AB1, small businesses by not diluting the set aside percentages, and ensuring the maximum opportunity for all those involved without harm). We are advocating change, but change as the law, regulations, and employment efficacy requires).

We feel the salient points of the program would be:

1. Social Enterprises will have to employ 35% (or more) people within the organization and with a disability (documented by Social Security Administration, VA, or another State Program). The entities in the set aside will have to be CI in the WIOA definition.
2. Social Enterprises will have to be organized for profit as defined by the Small Business Act.¹²¹³ Social Enterprises will be considered small businesses for other set aside programs under the Small Business Act.¹⁴
3. Requirements added to the program will only be those that were originally under JWOD for a period of five years and those which are unrestricted solicitations, meaning no set aside, currently. No small business requirements can be added to the program (as with 8(a)).
4. Small Business goals are increased to 24.5% of all contracts for the DOD (or government-wide), with Social Enterprises consisting 1.5% of that number (the increase). 1.25% of that figure is for those Social Enterprises focused on employment of people with disabilities. 0.25% of that number can be for programs focused on employment of people recently released from prison to reduce recidivism. That category

¹² To the extent that ownership must be traceable and in shares, we feel the most realistic option is for nonprofits to distribute shares in the for profit organization to employees in the program (an ESOP) or all program participants, which can then pay a dividend annually. We feel the Alaska Native Corporation (ANC) model can be used here to address the ownership questions.

¹³ It is important that the Social Enterprises be defined as small businesses so that those in the program can continue to participate in and sell products through small businesses in a distribution model (under FAR 19.102(f) for instance), and allow a synthesis with programs such as VA's Service Disabled Veteran Owned Small Business (SDVOSB) set aside program.

¹⁴ Some may argue that allowing nonprofits to participate in the program is an option, but the IRS created nonprofit status so as to protect where a social-need is being performed, and in the case of a competitive situation, creates a competitive advantage as nonprofits do not pay tax on profits whereas small, for profit businesses will. To keep the playing field level, it is essential that all organizations are treated similarly as it relates to taxes. Alternatively, there is nothing precluding a nonprofit from creating a for-profit subsidiary and paying Unrelated Business Tax Income (UBTI) on the profits accrued for those projects.

can focus on items on the FPI Procurement List and use the “waiver” found in FAR Part 8.6.

5. Performance of contracts in the Social Enterprise Set Aside category must be in accordance with HUBZone Limitations on Subcontracting, thus requiring similarly situated organizations to supply products under the Set Aside. A 10% price advantage is also afforded Social Enterprises as with HUBZone small businesses when prices are evaluated against other than small businesses.

6. The “Rule of Two” is made statutory for DOD procurements (or throughout the government in the Small Business Act), thus codifying the rule which is widely accepted in the contracting community and in the FAR.¹⁵

7. JWOD will remain a priority *after* the Rule of Two is satisfied, giving incentive for entities to shift to the new Set Aside.

8. Entities qualifying for the Social Enterprise category will be exempted from size standard limitations for a period of 5 years, renewed at the discretion of the DOD or SBA (if government-wide) for another 5 years. The exemption only applies to Social Enterprises in the set aside category, not any other small business category.

9. Requirements transferred from AB1 will be sole-source awarded to the current contractor for a period of 5 years after the transition, if the transition is made within 24 months of the creation of the program.

10. Sole-source contracts are applicable if no other offeror will bid on a requirement that is in the Social Enterprise set aside category before opening the requirement to broader competition. Prices must be fair market and if sole source, “cascading” is allowed to determine fair and reasonable.

11. DOD procurements through other Agencies (such as GSA) would be subject to the Social Enterprise Set Aside requirements.

These additional recommendations will apply to DOD procurements for requirements that stay in the AB1 program and not in the Social Enterprise Set Aside Program. If the Panel Chooses, these recommendations can be extended to government-wide. Many of

¹⁵ The Rule of Two is only statutorily applied to the simplified acquisition threshold. Amending the Small Business Act to incorporate the Rule of Two for all acquisitions statutorily would provide statutory support for the inclusion of a widely-held and accepted premise of government contracting.

these recommendations originated in the GAO's original review of the AB1 program in 2013 (see <https://www.gao.gov/products/GAO-13-457>).

12. JWOD additions to the Procurement List for DOD requirements are challengeable by small business at the GAO instead of having to protest in Federal Court to increase transparency and allow small businesses the ability to afford to challenge AB1 requirements. Moreover, the Commission will now be responsible for attorney's fees if the GAO decision is upheld.

13. AB1 nonprofits including CNAs cannot pay their executives salaries exceeding the SES levels set by the Office of Personnel Management (OPM) and paid to the Executive Director of Ability One for entities selling products under the AB1 program using JWOD to the DOD since they are considered "government sources of supply" under FAR Part 8.

14. CNA's cannot use funds from fees paid by entities selling products to the DOD to lobby Congress related to AB1. CNA fees are statutorily mandated by JWOD to perform oversight on behalf of the Federal Government over the program and should be used to perform that duty. Funds are effectively indirect appropriations to the CNAs since they are legally required by those nonprofits performing contracts to the government.

Alternatively, CNA fees under AB1 can become voluntary based on participation in the program and payable to the CNAs by the nonprofits and thus can be used to lobby Congress on behalf of the entities covered by the CNA.¹⁶ Essentially, CNA's are advocacy groups under the voluntary option.

15. JWOD must comply with Country of Origin requirements (Trade Agreements) and have a substantial transformation requirement for items supplied to the DOD. No more pass through "repackaging" of products for the DOD.

16. Employment under AB1 contracts (existing) which do not go to the set aside program must be training only, meaning a limited period.

¹⁶ The contradiction is demonstrated where NIB considers itself an advocacy group on behalf of people who are blind, but it receives the majority of its funds as the manager of the AB1 program and fees are mandated by those who participate in the program. If they are an advocacy group, then they should be one without the tie in of monopolistic regulatory power and fees to fund that function.

5.0 CONCLUSION

We feel the creation of a separate set aside category will allow those “industries” to preserve and enhance employment opportunities while allowing training agencies to continue to meet their mission with the proper oversight under JWOD. It is also necessary to create the harmony to bridge those changes Congress implemented with WIOA. The solution above allows for the best parts of JWOD and AB1 to continue while offering updates to a program which has transformed significantly since its inception in 1938.

We hope this document begins the conversation on how AB1 related to DOD can be strengthened, how AB1 can adjust to meet its mission in accordance with the current regulatory environment, and people with disabilities are offered CI opportunities instead of being incentivized to stay in minimum wage employment. We also feel the blue print offered here creates a government-wide option to update JWOD and meet the new needs of people in the program (and those of other Socio-Economic categories and programs such as VA’s SDVOSB set aside program).

Opening the AB1 business opportunities to small businesses and anyone who chooses to become a Social Enterprise will offer greater transparency, pricing stability, upward mobility for people with disabilities, introduce competitive pressures to benefit the end customer, and most important, offer DOD a stable partner for the future.

The solutions herein also address the incongruence of having the largest employment program for people with disabilities (AB1) being diametrically opposed to the intentions of WIOA and the drive to CI employment. The drive to CI employment did not start with WIOA and the principles should be embraced in how the government supports employment of people with disabilities in the future not how it was done in the past.

People with disabilities can, should and will be able to participate in the broader government marketplace through these Social Enterprises being considered small businesses, and participating in broader opportunities where appropriate, is another benefit (whereas AB1 nonprofits cannot participate as they are not considered small under SBA rules). The business models for employment of people with disabilities must be freed to foster innovation and respond to new market dynamics for government customers versus the rigid system in place now. The current business model restricts all involved in the AB1 program instead of increasing the flexibility the DOD needs to serve its mission as well as provide modern work opportunities and incentive alignment for program employees with disabilities. We feel the creation of the set-aside category and

using small business contracting regulations will afford a tried, true, and clearly defined method to meet contract methods, align stakeholders and providing much greater opportunities for employees with disabilities.