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## Decision

**Matter of:** Melwood Horticultural Training Center, Inc.

**File:** B-419424

**Date:** February 10, 2021

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### DIGEST

Protest challenging actions taken by a central nonprofit agency in connection with the allocation of a federal agency's requirement to a nonprofit agency under the AbilityOne program is dismissed because the U.S. AbilityOne Commission has exclusive authority under the Javits-Wagner-O'Day Act to establish and maintain the procurement list for the AbilityOne program in accordance with the overall purpose of the act.

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### DECISION

Melwood Horticultural Training Center Inc., of Upper Marlboro, Maryland, protests the terms of Opportunity Notice No. 3981, which was issued by SourceAmerica, a central nonprofit agency, for complete facility maintenance services at the Department of Health and Human Services's (HHS) facilities in Washington, D.C. The protester alleges that the procurement is being conducted in a manner that contravenes the requirements of the Javits-Wagner-O'Day Act (JWOD Act) and that Act's implementation under the AbilityOne program.<sup>1</sup>

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<sup>1</sup> The AbilityOne program is among the nation's largest sources of employment for people who are blind or have significant disabilities. The program is administered by the U.S. AbilityOne Commission, which is the operating name for the Committee for Purchase From People Who are Blind or Severely Disabled, which Congress established pursuant to the JWOD Act. See *Goodwill Indus. of the Valleys; SourceAmerica*, B-415137, Nov. 29, 2017, 2017 CPD ¶ 369 at 1 n.1. For clarification, references herein to the "Commission" or the "Committee" are to the U.S. AbilityOne Commission; references herein to the "agency" are to HHS. Following receipt and

We dismiss the protest.

## BACKGROUND

Under the JWOD Act, the Commission has the exclusive authority to establish and maintain a procurement list of supplies and services provided by qualified nonprofit agencies employing blind or severely disabled persons under the AbilityOne program. 41 U.S.C. §§ 8502(a), 8503(a); 41 C.F.R. § 51-2.8. The JWOD Act states that the procurement list is the mandatory source of supply for federal agencies for any good or service on that list:

An entity of the Federal Government intending to procure a product or service on the procurement list . . . shall procure the product or service from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled in accordance with regulations of the Committee and at the price the Committee establishes if the product or service is available within the period required by the entity.

41 U.S.C. § 8504(a). The JWOD Act provides governmentwide authority for noncompetitive acquisitions for specified supplies or services. See Federal Acquisition Regulation 6.302-5(b)(2); subpart 8.7.

SourceAmerica is designated by the Commission as a central nonprofit agency (CNA) that is charged with performing various functions in furtherance of the JWOD Act. See 41 U.S.C. § 8503(c); see *also* 41 C.F.R. § 51-3.1(a). For example, the JWOD Act specifies that CNAs “facilitate the distribution, by direct allocation, subcontract, or any other means, of orders of the Federal Government for products and services on the procurement list among qualified nonprofit agencies.” 41 U.S.C. § 8503(c). The JWOD Act’s implementing regulations further establish CNAs’ responsibilities, including:

- (a) Represent its participating nonprofit agencies in dealing with the Committee under the JWOD Act.
- (b) Evaluate the qualifications and capabilities of its nonprofit agencies and provide the Committee with pertinent data concerning its nonprofit agencies, their status as qualified nonprofit agencies, their manufacturing or service capabilities, and other information concerning them required by the Committee.
- (c) Obtain from Federal contracting activities such procurement information as is required by the Committee to:

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review of the agency report responding to the protest, GAO requested input from the Commission pursuant to 4 C.F.R. § 21.3(j).

- (1) Determine the suitability of a commodity or service being recommended to the Committee for addition to the Procurement List; or
  - (2) Establish an initial fair market price for a commodity or service or make changes in the fair market price.
- (d) Recommend to the Committee, with the supporting information required by Committee procedures, suitable commodities or services for procurement from its nonprofit agencies.
- (e) Recommend to the Committee, with the supporting information required by Committee procedures, initial fair market prices for commodities or services proposed for addition to the Procurement List.
- (f) Distribute within the policy guidelines of the Committee (by direct allocation, subcontract, or any other means) orders from Government activities among its nonprofit agencies.

41 C.F.R. § 51-3.2; see *also* 41 C.F.R. § 51-3.4 (establishing requirements for CNAs to distribute orders).

Relevant here, in 2019, the HHS Program Support Center reviewed its requirements for central facilities services for the Hubert H. Humphrey administrative facility located in Washington, D.C., and determined that the requirement was potentially appropriate for acquisition through the AbilityOne program. See Contracting Officer's Statement (COS) at 1. On September 9, HHS provided a performance work statement for the central facilities maintenance services to SourceAmerica. *Id.* at 2. In October, SourceAmerica issued Opportunity Notice No. 3753 to its nonprofit agencies for HHS's requirements. The opportunity notice contemplated the issuance of an indefinite-delivery, indefinite-quantity contract with a 1-year base period, four 1-year option periods, and an anticipated annual estimated value of \$7.1 million. Protest, ex. D, Opportunity Notice No. 3753 at 4. Other than the performance work statement, SourceAmerica, not HHS, drafted and issued the opportunity notice. COS at 2.

On November 19, HHS, at SourceAmerica's request, scheduled a site visit and attended a meeting to allow Melwood the opportunity to present its capabilities. During the meeting, SourceAmerica represented that Melwood was its recommended source for HHS's requirements. HHS did not have any communications with Melwood before or after the November 19 site visit, and was not involved in SourceAmerica's decision to select Melwood as the recommended nonprofit agency. *Id.* at 2-3; Protest, ex. L, Questions & Answers on Opportunity Notice No. 3981, at 6. On November 22, the Commission published a notice in the Federal Register indicating its intent to add HHS's requirements to the procurement list, and designating Melwood as the mandatory source. Protest, ex. B, Procurement List; Proposed Additions or Deletions, 84 Fed. Reg. 64468 (Nov. 22, 2019). The notice specified that "[if] the Committee approves the

proposed additions, the entities of the Federal Government identified in this notice will be required to procure the services” from the specified nonprofits. *Id.*

The proposed addition of the services to the procurement list with Melwood as the mandatory source, however, was never completed. Specifically, Melwood and SourceAmerica undertook pricing negotiations beginning in November 2019, but the parties could not reach agreement. On February 12, 2020, HHS requested that SourceAmerica update the agency with respect to the status of the acquisition. SourceAmerica represented that it would communicate with Melwood; HHS was not a party to those discussions. COS at 3. On February 24, SourceAmerica notified Melwood that, due to the parties’ inability to complete negotiations in a timely manner, SourceAmerica was revoking Opportunity Notice No. 3753, and “Melwood is no longer considered the recommended [nonprofit agency] to perform the work.” Protest, ex. E, SourceAmerica Letter to Melwood. On February 26, SourceAmerica notified HHS of its decision not to move forward with Melwood; HHS was not involved in SourceAmerica’s consideration of Melwood for the acquisition or the decision not to move forward with Melwood. COS at 3.

Also on February 26, SourceAmerica provided HHS with references for another AbilityOne vendor, Skookum Educational Services. On February 28, HHS, at SourceAmerica’s request, scheduled a site visit and attended a meeting to allow Skookum the opportunity to present its capabilities. During the meeting, SourceAmerica represented that Skookum was its recommended source for HHS’s requirements. HHS did not have any communications with Skookum before or after the February 28 site visit, and was not involved in SourceAmerica’s decision to select Skookum as the next recommended nonprofit agency. COS at 4; Protest, ex. L, Questions & Answers on Opportunity Notice No. 3981, at 6.

On March 13, the Commission published a notice in the Federal Register indicating its intent to add HHS’s requirements to the procurement list, and designating Skookum as the mandatory source. Protest, ex. F, Procurement List; Proposed Additions or Deletions, 85 Fed. Reg. 14651 (Mar. 13, 2020). As with the prior notice involving Melwood, this notice specified that “[if] the Committee approves the proposed addition, the entities of the Federal Government identified in this notice will be required to procure the service” from the specified nonprofits. *Id.* As with the proposed addition of Melwood to the procurement list, Skookum’s proposed addition was never completed.

In this regard, while SourceAmerica was moving forward with negotiations with Skookum, Melwood pursued administrative appeals with SourceAmerica and the Commission. Specifically, on March 9, Melwood filed an appeal with SourceAmerica challenging the revocation of Opportunity Notice No. 3753. Having not received a response from SourceAmerica and deeming the lack of a response as denial of its appeal, on April 14, Melwood filed an appeal with the Commission. On April 27, SourceAmerica denied Melwood’s March 9 appeal, directing it to the Commission’s appeal process set forth in Commission Policy 51.301. On May 11, Melwood filed a renewed appeal with the Commission alleging that SourceAmerica (1) failed to follow its

established policies and procedures, and (2) did not properly document its decision. See Protest, exh. G, Melwood Appeal Letter (May 11, 2020) at 1-2.

On July 22, representatives of the Commission contacted HHS to explain that the Commission had identified certain administrative errors associated with SourceAmerica's negotiations with Melwood. See, e.g., Agency Report (AR), Tab 13, Email from Commission to HHS (July 22, 2020) 1. Based on further conversations between the Commission and HHS, HHS decided to move forward with pursuing its requirements under the AbilityOne program. The Commission planned to have SourceAmerica request that both Melwood and Skookum provide technical proposals based on a not-to-exceed amount for 12 months of service. SourceAmerica would then negotiate a contract price for the full performance period with the vendor evaluated as offering the superior technical proposal, and make a final recommendation to the Commission. See AR, Tab 15, Internal HHS Email (July 24, 2020), at 1.

In order to facilitate the submission and evaluation of proposals, HHS was asked to provide a not-to-exceed amount for the initial 12 months of performance, as well as proposed technical evaluation criteria. See AR, Tab 19, Internal HHS Email (July 29, 2020), at 1. Additionally, HHS would provide technical evaluation assistance to SourceAmerica, with SourceAmerica ultimately responsible for making a final recommendation to the Commission. See, e.g., AR, Tab 26, Commission Proposed Acquisition Milestones (establishing estimated date of Nov. 24, 2020 for SourceAmerica to complete its evaluation and make a recommendation to the Commission); Protest, exh. I, Opportunity Notice No. 3981 at 5 (providing that SourceAmerica will use "an evaluation process that affords the Federal Customer the opportunity to provide feedback to SourceAmerica for consideration of the SourceAmerica Recommendation Authority").

On August 4, while the Commission and HHS were exploring next steps, the Commission notified Melwood that the Commission intended to sustain Melwood's Commission-level appeal. Specifically, the Commission notified Melwood that:

- SourceAmerica's Nonprofit Agency Recommendation Procedure does not address revocation of an assignment.
- The administrative record does not consistently demonstrate a rational connection between the facts and the decisions made.
- Several of the deadlines Melwood ostensibly missed could not reasonably be met, due to incomplete information or other extenuating circumstances.
- SourceAmerica's target of \$4.3 million for Melwood's price proposal was not consistent with the contract value cited in the Opportunity Notice (ON).

Protest, exh. H, Commission Letter to Melwood (Aug. 4, 2020) at 1. Based on the identified concerns, the Commission stated that the procurement list addition package for HHS's requirements would be returned to SourceAmerica for corrective action. *Id.*

On November 3, SourceAmerica issued Opportunity Notice No. 3981 to Melwood and Skookum. Protest, exh. I, Opportunity Notice No. 3981; see *also* Protest, exh. C, Procurement List; Proposed Additions or Deletions, 85 Fed. Reg. 71061 (Nov. 6, 2020) (announcing proposed addition of HHS's requirements to the procurement list and identifying as the designated source of supply as Melwood or Skookum). For Opportunity Notice No. 3981, the annual not-to-exceed value is \$5.7 million. Protest, exh. L, Questions & Answers on Opportunity Notice No. 3981, at 1. In addition to the changed anticipated annual contract value, the current opportunity notice includes additional proposal submission requirements and evaluation criteria that were not included in the original opportunity notice.

For example, vendors are now required to submit price proposals, which "will be utilized as the proposed Fair Market Price (FMP) for the [procurement list] addition." Protest, exh. I, Opportunity Notice No. 3981 at 3. Additionally, the opportunity notice requires key personnel to meet minimum certification and experience requirements, and vendors to submit direct labor staffing and subcontracting plans. *Id.* at 5-7. Other than providing technical evaluation criteria, HHS was not otherwise involved in drafting or issuing the opportunity notice, nor in SourceAmerica's decision to require price proposals. COS at 6-7. This pre-award protest followed.<sup>2</sup>

## DISCUSSION

Melwood raises three primary challenges to the acquisition of HHS's requirements. First, the protester argues that SourceAmerica's decisions to (i) cancel the original solicitation that sought a direct allocation of HHS's requirements to Melwood, and

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<sup>2</sup> While not directly relevant to this acquisition for HHS's requirements, we note that Congress has directed the Department of Defense to explore changes to the AbilityOne program, including obtaining competition for program requirements. Specifically, section 898 of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016) (the 2017 NDAA), directed the Secretary of Defense to establish a "Panel on Department of Defense and AbilityOne Contracting Oversight, Accountability, and Integrity." Among the section 898 panel's tasks is to "recommend ways the Department of Defense and the AbilityOne Commission may explore opportunities for competition among qualified nonprofit agencies or central nonprofit agencies and ensure equitable selection and allocation of work to qualified nonprofit agencies." 2017 NDAA § 898(c)(6). The Department of Defense has proposed certain acquisitions for inclusion in a section 898 pilot program, which have been or currently are the subject of litigation in federal courts. See, e.g., *Melwood Horticultural Training Center, Inc. v. United States*, 151 Fed. Cl. 297, 302-303 (Nov. 23, 2020) (discussing the relevant 2017 NDAA provisions, implementation of the section 898 pilot program, and related litigation).

(ii) issue a new solicitation competing the requirements between Melwood and Skookum is unreasonable. Melwood contends that SourceAmerica's decisions are unreasonable because (1) it is improper corrective action in response to the Commission's decision on Melwood's Commission-level protest, and (2) cancellation was otherwise unreasonable because HHS's requirements have not changed. Second, Melwood challenges the proposal submission deadline and certain solicitation provisions as unduly restrictive of competition. Third and finally, the protester alleges that the solicitation's requirements for the submission of pricing proposals violates the JWOD Act, and its implementing rules and regulations.

HHS and the Commission request dismissal of the protest, arguing that the protester's allegations--which all effectively involve actions taken by SourceAmerica--fall outside of GAO's bid protest jurisdiction with respect to actions under the JWOD Act and AbilityOne program. In this regard, the agency and Commission argue that GAO decisions have narrowly interpreted the scope of our jurisdiction with respect to procurements under the JWOD Act and AbilityOne program as limited to reviewing actions by procuring agencies with respect to their compliance with the JWOD Act and its program requirements. HHS and the Commission argue that the protester is challenging SourceAmerica's process for allocating requirements, and the Commission's process for adding requirements to the AbilityOne procurement list. According to HHS and the Commission, these process challenges are intrinsic to the Commission's decision whether to add a service to the procurement list, which our Office does not review as part of our bid protest function because such decisions are committed to the Commission's discretion.

Melwood opposes dismissal, arguing that the unique structure of the AbilityOne program procurement process makes HHS (the procuring agency), the Commission (the entity implementing the JWOD Act), and SourceAmerica (the CNA statutorily charged with allocating program requirements) "intimately related." Melwood Response to Commission Br. at 3. Based on this unique relationship, Melwood effectively argues that we should find the actions of SourceAmerica and the Commission are undertaken by or directly on behalf of HHS, and, thus, within the scope of our protest jurisdiction. Specifically, the protester alleges that the jurisdictional challenge advanced by HHS and the Commission:

[I]gnores the complexity of the contracting process under this Program and would treat the procuring Agency, the Commission, and the CNA as entirely distinct entities when, in actuality, the Commission is working at the behest of the Agency voluntarily availing itself to its authority, and the CNA is the entity chosen by statute to work on behalf of the Commission. These three entities are intimately related--the Agency is the party procuring services, the Commission is the party determining which services may be procured and by whom, and the CNA is the Commission's contractor providing the work up front to allow for the Commission to determine what and who should be added to the Procurement List.

*Id.*

For the reasons that follow, we find the protester's allegations present matters beyond our Office's bid protest jurisdiction, and therefore, we dismiss the protest.

This case presents novel questions of jurisdiction with respect to our Office's review of actions involving the AbilityOne program. In prior decisions concerning the AbilityOne program, our Office has explained that we will not consider protests challenging the Commission's determination regarding items to be included on the procurement list because 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, e.g., *Team Wendy, LLC*, B-417700.2, Oct. 16, 2019, 2019 CPD ¶ 361 (dismissing protest filed by AbilityOne program approved nonprofit challenging the proposed addition of a product to the procurement list that was produced by another AbilityOne program eligible nonprofit); *Abel Converting, Inc.*, B-229581, Mar. 4, 1988, 88-1 CPD ¶ 233 (same, with respect to protest filed by a firm not eligible to participate in the AbilityOne program challenging procuring agency's proposed acquisition from AbilityOne program).

By contrast, our Office will address the merits of protests challenging a procuring agency's failure to comply with its express obligations under the JWOD Act and the Act's implementing regulations. For example, we will review whether a procuring agency has met its obligation to procure products or services from the procurement list, or is improperly procuring products or services that are not on the procurement list. See, e.g., *Training, Rehab. & Dev. Institute, Inc.*, B-418480, May 13, 2020, 2020 CPD ¶ 171 (denying protest that procuring agency improperly proposed to acquire services on a competitive basis rather than on a sole-source basis to the AbilityOne program incumbent where the services being solicited were not the same as the services provided under the prior contracts that had been awarded on a sole-source basis pursuant to the JWOD Act); *Goodwill Indus. of the Valleys; SourceAmerica, supra* (sustaining protest where the procuring agency's acquisition of custodial services failed to comply with applicable JWOD Act requirements where the protester was the mandatory source for the services); *Alternative Contracting Enters., LLC; Pierce First Med.*, B-406265 *et al.*, Mar. 26, 2012, 2012 CPD ¶ 124 (denying protest alleging that the procuring agency violated the requirements of the Veterans Benefits, Health Care, and Information Technology Act of 2006 by instead complying with the requirements of the JWOD Act); *OSC Solutions, Inc.*, B-401498, Sept. 14, 2009, 2009 CPD ¶ 185 (sustaining protest where agency unreasonably cancelled solicitation and issued sole-source award under the AbilityOne program, but the goods were not on the AbilityOne procurement list).

Unlike prior cases involving the AbilityOne program presented to our Office, Melwood (i) neither challenges the inclusion or non-inclusion of the challenged services on the AbilityOne procurement list, (ii) nor alleges that HHS, the procuring agency, is failing to comply with the requirements of the AbilityOne program to acquire services that are on



the AbilityOne procurement list (or is attempting to acquire goods or services under the AbilityOne program that are not on the procurement list). Rather, the protester challenges the process by which the proposed services will be added to the AbilityOne procurement list. Specifically, the protester effectively alleges that SourceAmerica-- which is a nongovernmental, nonprofit organization--at HHS's behest and for HHS's benefit, is administering the process in a manner that is unreasonable, and inconsistent with the JWOD Act's requirements.

We find, however, that the protester's arguments challenging the process utilized with respect to adding the required services to the procurement list exceed our jurisdiction with respect to questions involving the AbilityOne program. In this regard, as we have explained, whether a product or service is added to the procurement list is a question entrusted to the Commission's discretion. The administration of the process for deciding whether to place a product or service on the procurement list is inextricably linked to the ultimate determination of whether the product or service is placed on the procurement list, and, therefore, is similarly within the Commission's discretion.<sup>3</sup>

Furthermore, we do not find persuasive Melwood's arguments that HHS's involvement, in terms of identifying its requirements, assisting in establishing technical evaluation criteria, and providing technical evaluation support to SourceAmerica, is sufficient to confer jurisdiction under these circumstances. See *Team Wendy, supra* at 6 (dismissing protest for lack of jurisdiction notwithstanding agency's request to add a product to the product list); *National Indus. for the Blind*, B-409528.20, July 2, 2014, 2014 CPD ¶ 204 at 8-9 (denying protest filed by AbilityOne program participant challenging solicitation issued by the procuring agency, and explaining that the JWOD Act provides the Commission "with the authority to set the requirements for vendors under the JWOD Act"). In reaching this conclusion, we look to our decisions addressing our jurisdiction over protests challenging subcontract awards under federal contracts.

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<sup>3</sup> Melwood argues that our decision declining to find jurisdiction over the actions of the Commission and/or its designated CNA would leave an AbilityOne program contractor "with no legal rights." Melwood Response to Commission Br. at 3. The protester is incorrect. First, the Commission will hear assignment and allocation appeals under the following circumstances: (a) a CNA fails to follow their established policies and procedures; (b) a CNA did not properly document its decision; or (c) the nonprofit selected by the CNA does not meet the minimum criteria. U.S. AbilityOne Commission, Policy 51.301, Selection of Nonprofit Agencies for Project Assignment and Order Allocation, at § 6(d). Indeed, one of Melwood's protest allegations is that SourceAmerica is unreasonably implementing corrective action in response to such a Commission-level appeal filed by Melwood that the Commission sustained.

Second, as discussed in note 6 *infra*, other AbilityOne program participants in the context of other procurements have challenged actions taken by the Commission with respect to implementation of the JWOD Act in federal courts of competent jurisdiction. These actions have been brought pursuant to the Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706, and the Tucker Act, 28 U.S.C. § 1491.

We find these decisions instructive because, like the protester in this case, the protesters based our jurisdiction on the premise that the federal agencies were so extensively involved with the challenged procurement actions that the procurement actions should be treated as having been taken “by” the federal agency.

More specifically, under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3557, our Office has jurisdiction to resolve bid protests concerning the solicitations and contract awards that are issued “by a Federal agency.” 31 U.S.C. § 3551(1)(A). Under our bid protest rules, we do not review procurements where a government contractor enters into a subcontract “for” the government, unless we find that a subcontract essentially was awarded “by” the government. 4 C.F.R. § 21.5(h); *The Boeing Co.; Bombardier, Inc.*, B-414706, B-414380.2, Aug. 25, 2017, 2017 CPD ¶ 274 at 6. In this regard, we have considered a subcontract procurement to be “by” the government when the agency handled substantially all of the substantive aspects of the procurement, and, in effect, took over the procurement, leaving to the prime contractor only the procedural aspects of the procurement, *i.e.*, issuing the subcontract solicitation and receiving proposals. *The Boeing Co.; Bombardier, Inc.*, *supra*. In contrast, we have found subcontractor procurements are not “by” the government where the prime contractor handled meaningful aspects of the procurement, such as preparing the subcontractor solicitation and evaluation criteria, evaluating the offers, negotiating with the offerors, and selecting the awardee. *Raytheon Co.*, B-415722 *et al.*, Dec. 28, 2017, 2018 CPD ¶ 56 at 5.

For example, we have found jurisdiction over a protest challenging a subcontract award when the solicitation issued to prospective subcontractors advised that the government would make the selected decision, the agency evaluated the proposals of prospective subcontractors, and the agency selected the successful proposal without receiving an award recommendation from the prime contractor. *The Panther Brands, LLC*, B-409073, Jan. 17, 2014, 2014 CPD ¶ 54 at 6. In contrast, in *The Boeing Co.; Bombardier, Inc.*, we found that we did not have jurisdiction over a proposed subcontract award when the prime contractor was required to select a subcontractor, subject to the requirements established by the Department of the Air Force. We found nothing in the prime contract indicated that the Air Force would handle the substantive aspects of the subcontract procurement, such that the prime contractor would be left with only a procedural role. We therefore explained that the decision to select the subcontractor was a matter that would occur under a proposed subcontract, and therefore the terms of the subcontract competition and the merits of the selection decision were matters not within the jurisdiction of our Office. *The Boeing Co.; Bombardier, Inc.*, *supra*, at 7.

Applying the foregoing analytical framework, it is apparent that SourceAmerica--a non-governmental CNA--is responsible for almost all of the meaningful aspects of the procurement, including making the ultimate award recommendation to the

Commission.<sup>4</sup> See Protest, exh. I, Opportunity Notice No. 3981 at 5 (providing that HHS would provide evaluation feedback to the SourceAmerica Recommendation Authority). As discussed above, the JWOD Act requires that CNAs “facilitate the distribution, by direct allocation, subcontract, or any other means, of orders of the Federal Government for products and services on the procurement list among qualified nonprofit agencies.” 41 U.S.C. § 8503(c). The JWOD Act’s implementing regulations further highlight the central role fulfilled by CNAs in allocating requirements among qualifying nonprofits, including: evaluating the qualifications and capabilities of its nonprofit agencies; recommending to the Commission suitable commodities or services for procurement from its nonprofit agencies; and recommending to the Commission initial fair market prices for commodities or services to be added to the procurement list. 41 C.F.R. § 51-3.2.

Applying this analysis here, it is apparent that SourceAmerica, a non-governmental, nonprofit entity, is conducting material, substantive aspects of this procurement, and, critically, the aspects that present the crux of the protester’s objections. For example, Melwood complains that SourceAmerica is improperly conducting a competition among eligible nonprofit program participants, as opposed to directly allocating the requirement to Melwood. As set forth above, however, applicable law entrusts allocation determinations to CNAs. 41 U.S.C. § 8503(c); 41 C.F.R. § 51-3.2(f). In this regard, we agree with the Commission that Congress entrusted allocation decisions to the CNAs, not to the Commission or procuring agencies. Specifically, the Commission argues that:

In fact, the Commission is required by the JWOD Act to delegate to nonprofit entities as CNAs certain functions of the Program expressly reserved for the CNAs to perform that the Commission does not have authority to perform. The JWOD Act specifies certain actions that are to be performed by the CNAs in the AbilityOne Program, namely “to facilitate the distribution, by direct allocation, subcontract, or any other means, of orders of the Federal Government for products and services on the procurement list among qualified nonprofit agencies.” The CNAs do not perform those functions on behalf of the Commission--as Congress bestowed those authorities on the CNAs alone, so the CNAs do not step into the Commission’s shoes to perform those functions--or the federal agencies making purchases, but rather in furtherance of the JWOD Act to promote employment for blind or significantly disabled employees.

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<sup>4</sup> As discussed above, SourceAmerica is a non-governmental, nonprofit entity. As a result, we do not generally have jurisdiction over the actions of SourceAmerica since our bid protest jurisdiction under CICA only extends to solicitations and contract awards that are issued “by a Federal agency.” 31 U.S.C. § 3551(1)(A).

Commission Br. at 2-3 (internal citation omitted).<sup>5</sup>

As another example, Melwood complains that the requirement for price proposals is inconsistent with the JWOD Act, and effectively results in an abdication of the Commission's responsibility to establish fair market prices. As set forth above, however, CNAs are charged with making a recommendation, with supporting information, as to initial fair market prices. 41 C.F.R. § 51-3.2(e). Here, SourceAmerica, not HHS, is soliciting and evaluating prices for the purpose of establishing initial fair market price recommendations to the Commission. Furthermore, after the evaluation of initial technical proposals, SourceAmerica will negotiate total prices with the prospective awardee and make its recommendation to the Commission. Given the roles of HHS, SourceAmerica, and the Commission, as prescribed by statute and regulation under the AbilityOne program, as well as the limited actions actually taken by HHS in connection with this procurement to date, there is no basis for Melwood's contention that the protest raises issues within the limited scope of our jurisdiction over protests in connection with the AbilityOne program. Therefore, our Office is compelled to dismiss the protest because it presents questions outside of our bid protest jurisdiction.<sup>6</sup>

The protest is dismissed.

Thomas H. Armstrong  
General Counsel

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<sup>5</sup> As described above, the Commission will hear allocation appeals under certain circumstances, and is ultimately responsible for whether it will accept a CNA's recommendation for the addition of a good or service to the procurement list.

<sup>6</sup> As we dismiss the protest for lack of jurisdiction, we provide no views as to the merits of the protest, especially as to the Commission's and SourceAmerica's use of a competitive allocation process and evaluation of price. These and related questions will ultimately need to be litigated and resolved in other forums with the appropriate jurisdiction to consider them. See, e.g., *Melwood Horticultural Training Center, Inc.*, 151 Fed. Cl. at 311 (dismissing for lack of subject matter jurisdiction and transferring to the appropriate U.S. District Court a challenge under the APA to the Commission's implementation of the Section 898 Panel Pilot Program, and dismissing as premature a challenge to the proposed inclusion of a price evaluation in a JWOD procurement, but noting "the Court has grave concerns about the legality of the Pilot Program and AbilityOne's execution of it"); *Pride Indus., Inc. v. Committee for Purchase from People Who Are Blind or Severely Disabled*, 420 F. Supp. 3d 1035, 1044-45 (E.D. Cal. 2019) (denying request for preliminary injunction in case challenging use of section 898 panel pilot program procedures in a JWOD procurement where no award had been made and, thus, there was no final agency action for purposes of APA review, but noting that the pilot program "appears to significantly modify if not abandon statutorily prescribed pricing and allocation processes").