



**TERRY ALLEN PERL**  
PRESIDENT  
CHIEF EXECUTIVE OFFICER

January 31, 2006

VIA EMAIL (Rulescomment@jwod.gov) and  
VIA FACSIMILE (703) 603-0030

The Committee for Purchase From People  
Who Are Blind or Severely Disabled  
ATTN: Stephanie Hillmon, Assistant General Counsel  
1421 Jefferson Davis Highway  
Jefferson Plaza 2 Suite 10800  
Arlington, VA 22202-3259

Re: Comments on Committee for Purchase Advanced Notice of Proposed  
Rulemaking Proposed 70 Fed. Reg. 74,721

Dear Ms. Hillmon:

The Chimes ("Chimes") hereby submits its comments concerning the advance notice of proposed rulemaking relating to governance standards and the effect of executive compensation on fair market price determinations in the Javits-Wagner-O'Day ("JWOD") program published by the Committee For Purchase From People Who Are Blind or Severely Disabled (the "Committee") on December 16, 2005 (70 Fed. Reg. 74,721). Chimes is a nonprofit organization serving persons with disabilities in the United States and overseas, and has been a participant in the JWOD program since 1994. Chimes employs approximately 1250 people with disabilities, and a total of approximately 1600 persons in the JWOD program. Chimes is exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended.

**A. Self Governance Provisions Regarding Executive Compensation**

The Chimes applauds the Committee's efforts to develop reforms in the area of self-governance, and recognizes that the Committee's objectives are to strengthen and protect the JWOD program over the long term. The Chimes supports the application of general self-governance process requirements to JWOD nonprofit agencies. The Committee, however, should be very cautious so that it does not take steps that might

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have the effect of changing the JWOD statutory eligibility criteria. If there are legal problems with the new regulations, they could undermine the Committee's efforts. Based on the Federal Register notice, it seems that there may be some risk of this in the area of executive compensation.

Specifically, at this time, it is unclear precisely what the purpose is of the "rebuttable presumption" in item (14) of the governance standards. If it were to be a presumption that is rebuttable by the Committee, then the Committee may be in danger of placing itself in the position of reviewing specific employee's compensation and controlling entry to the JWOD program based on that review. For all the reasons set forth in the Chimes' December 10, 2004 Comments concerning the prior proposed rule, the Committee should be careful not to control entry/continuation in the JWOD Program based on Committee determinations concerning the reasonableness of specific employee compensation. That would likely be an addition of an eligibility criteria that changes the statutory criteria. <sup>1</sup>

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<sup>1</sup> Congress has defined "qualified nonprofit agencies" with a high degree of specificity in the definitional section of the JWOD ct, 41 U.S.C. § 48b. The Committee cannot add to or change those statutory eligibility criteria. Congress provided that a "qualified nonprofit agency for other severely handicapped" means an agency:

- (A) "organized under the laws of the United States or of any State, operated in the interest of severely handicapped individuals who are not blind, and the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual;"
- (B) which complies with any applicable occupational health and safety standard prescribed by the Secretary of Labor; and
- (C) Which in the production of commodities and in the provision of services (whether or not the commodities or services are procured under sections 46 to 48c of this title) during the fiscal year employs blind or other severely handicapped individuals for not less than 75 per centum of the man-hours of direct labor required for the production or provision of the commodities or services.

The current JWOD qualification regulations match up to the specific statutory qualifications criteria. 41 C.F.R. § 51-4.1.

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An organization is eligible for the JWOD program so long as, among other requirements, it is "organized under the laws of the United States or of any state" and its net income "does not inure in whole or in part to the benefit of any shareholder." 41 U.S.C. § 48(b). A Committee review and "rebuttal" of nonprofit agency executive compensation decisions, without regard to whether the net income inures to the benefit of any shareholder or individual or not, could potentially add an improper eligibility criteria which the Committee surely wants to avoid. Moreover, the language in the JWOD statute concerning inurement to private individuals is virtually identical to language contained in Sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and is similar to the language contained in many state nonprofit corporation acts.<sup>2</sup> (Indeed, as a practical matter only private entities approved by the IRS as 501(c)(3)'s are also approved for JWOD program participation.) Regulation by the Committee in this area could result in a nonprofit receiving different treatment under each statute. Therefore, given that Congress and Senator Grassley are currently contemplating major revisions to the guidelines for executive compensation in not-for-profits, it would be imprudent to preempt the Senator and his committee's work in this area. The Chimes urges the Committee to defer to the IRS standards as they currently exist and as they may be amended by Congress as a result of Senator Grassley's initiative.<sup>3</sup>

Also, the proposed rule could be interpreted as allowing the Committee to deny entry/continuation in the JWOD program because in its opinion a nonprofit agency is not following the "rebuttable presumption process" because it is not reviewing all executive compensation at or above the \$90,000 threshold. This appears to be a compensation threshold to determine whether a nonprofit has followed the rebuttable presumption process. If a JWOD applicant does not review compensation of all employees at or above that level, it could be denied entry to the program, and therefore this requirement may also step too close to changing the statutory eligibility criteria. Also, the application of such a threshold across all JWOD nonprofits will pose some problems. The threshold would require all boards of all nonprofit agencies to review

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<sup>2</sup> IRC § 501(c)(3) states that certain organizations qualify as tax exempt nonprofits if "no part of the net earnings of which inures to the benefit of any private shareholder or individual." See also, e.g., District of Columbia Nonprofit Corporation Act § 29-301.02; Kentucky Nonprofit Corporation Acts § 273.161; New Mexico Nonprofit Corporation Act § 53-8-2.C; New York Not-for-Profit Corporation Law § 102(a)(5); Texas Non-profit Corporation Act § 1396-2.24; and Virginia Nonstock Corporation Act § 13.1-814.

<sup>3</sup> Also, the Internal Revenue Code provisions, as specific statutes that address the matter of self-governance of nonprofits and executive compensation, take precedence over the JWOD Act, which has already been found to be a general procurement statute. See *NISH v. Cohen*, 247 F.3d 197 (4<sup>th</sup> Cir. 2001).

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the compensation packages of employees earning more than \$90,000 regardless of the characteristics of the nonprofit. At some large nonprofits, a salary of \$90,000 may be earned by numerous people, both "line" or direct charge people who run the agency's operations and overhead charge personnel who run administrative and high level management functions (accounting, human resources, legal). It would be burdensome and arbitrary to require a board to review all of these compensation packages. By contrast, a smaller nonprofit may have few if any persons at that level. Therefore, the Committee should be wary of not crossing the line and adding substantive threshold eligibility criteria beyond those in the statute. As long as the board of the nonprofit agency monitors and approves compensation packages for the President/CEO and the highly paid executives (perhaps those within a small percentage of the top paid executive), the *process* requirement alone (requiring that the nonprofits in fact review executive compensation) should effectively implement the Committee's objectives.

**B. Effect of Executive Compensation on Fair Market Price Determination**

Fair market prices (unlike costs in a cost reimbursable contract) are not determined based on the cost elements that may make up the price, and are also not based on the cost elements in an indirect cost pool. Rather, a fair market price determination is based on the total fixed price, regardless of its composition. See Pricing Memorandum No. 3, ¶ 8.A. (emphasis added) which provides:

Upon receipt of the price proposal, the Contracting Activity will perform a price analysis. Price analysis is the preferred method of evaluating proposals under the JWOD Program. **Price analysis is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed Net Proceeds.** The expectation is that the frank exchange of ideas and information permitted under the JWOD Program, fostered through partnering, will result in a determination of price reasonableness using price analysis alone. Price analysis methods include:

- (1) Comparison of the proposed prices with previously proposed prices and previous Government and commercial prices for the same or similar items or services, allowing for adjustments in wages, health and welfare benefits and changes in the scope of work.
- (2) Use of benchmarks or other parametric estimating methods (for example, dollars per unit).
- (3) Comparison with competitive published prices, published market prices of products, or similar indexes.
- (4) Comparison with Independent Government Estimates.

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(5) Comparison of proposed prices with prices obtained through market research, allowing for differences in scope of work, quality requirements, wages, competition and other factors.

(6) Analysis of pricing information submitted by the Nonprofit Agency or NIB or NISH, including information on the prices at which the same or similar services have previously been sold. This may also include discussions about how the Nonprofit Agency arrived at its price, including references to specific cost elements, but does not require the submission of cost or pricing data.

Moreover, executive salaries and compensation are typically part of a JWOD nonprofit's General & Administrative expenses. In JWOD contracts, the overhead (G&A) rate that is allowed to be charged to a JWOD contract is by custom set by NISH. So, the nonprofit has little or no discretion or control over what goes into the G&A component of its prices in terms of G&A. If its executives are highly paid or paid less than the average, it really has no impact because the G&A is fixed by NISH.

If the Committee engages in the review of an executive's compensation package for a fixed price contract when the fair market price can be determined by the means set out in Pricing Memorandum 3, then the Committee is really trying to do something other than make a fair market price recommendation. (It appears to be an imposition of a cap on what an executive is paid v. what the government pays for executive compensation as part of a contract price). Under the statute, the appropriate subject for regulation is what costs are charged to a JWOD contract, not what compensation the nonprofit decides to pay its executives.<sup>4</sup> It would be a rare circumstance where the cost elements of a fixed price contract would need to be reviewed, but if that circumstance arose, the Committee should only be determining whether the costs actually being included in the price are reasonable, just as is the case under the FAR cost principles. An executive may be paid more than the compensation being included in contract costs. If so, that additional compensation is really irrelevant to a fair market price determination, since it

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<sup>4</sup> There are hundreds and possibly thousands of nonprofits (*e.g.*, universities and research institutions) that receive Federal funds through grants, other awards, and Federal contracts. There is no cap on their executive salaries; rather there is only a cap on what can be charged to the grant or contract. *See* OMB Circulars A-122, Att. B, § 8.<sup>4</sup> Similarly, there are thousands of for-profit Federal contractors. There has never been a cap on what those entities can pay their executives under the Federal procurement laws. There has only been a cap on what those entities can charge the Federal Government. And that cap is based on the industry norm. *See* 41 U.S.C. § 435 (OFPP sets the benchmark based on the median compensation provided to senior executives (the 5 most highly compensated) of all benchmark corporations (publicly owned U.S. corporations with sales in excess of \$50 million).<sup>4</sup>

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is not part of the price. And for cost reimbursement contracts, such a review should only be done of what costs are actually going into the price. The concept of "influence" on fair market prices is not one that is found anywhere in the Federal procurement statutes, regulations or case law.

If the Committee desires to control actual executive compensation costs that go into JWOD contract prices and are charged to JWOD contracts, Chimes respectfully suggests that it propose a regulation along the lines of the OMB Circular A-122 provisions or the FAR cost allowability regulations. See FAR § 31.205-6.

Thank you very much for considering our comments regarding the advance notice of proposed rulemaking.

Sincerely,



Terry Allen Perl  
President and CEO

TAP:bh