

Date: August 6, 2019

From: Executive Director, Office of Acquisition and Logistics (003A), and Senior Procurement Executive

Subj: VA PROCUREMENT POLICY MEMORANDUM (2016-05)(Revised AUG 2019) – Implementation of the Veterans First Contracting Program (VIEWS 01368239)

To: Heads of Contracting Activities

1. **Purpose:** The purpose of this Procurement Policy Memorandum (PPM) is to—

a. Revise and reissue PPM 2016-05 (Revised AUG 2019) – Implementation of the Veterans First Contracting Program. (Note: Changes to the original PPM, as revised September 27, 2018, and other than minor administrative formatting or grammatical corrections are denoted by a solid bar line in the right-hand margin.)

b. Provide revised internal policy and procedures as a result of Class Deviation from VAAR 808.002, Priorities for Use of Government Supply Sources and VAAR Subpart 808.6, Acquisition from Federal Prison Industries, Inc., dated May 20, 2019; and the Temporary Rule published in the Federal Register on June 24, 2019 at [84 FR 29389](#). The Temporary Rule is effective June 24, 2019 through July 1, 2021.

c. Identify the rescinded policy concurrent with, and effective, the date of the publication of the original PPM, dated July 26, 2016:

1) Acquisition Policy Flash 16-16, United States Supreme Court decision concerning the SDVOSB/VOSB contracting program at the Department of Veterans Affairs, June 22, 2016.

2) Acquisition Policy Flash 16-11, Class Deviation from VAAR part 808, Required Sources of Supplies and Services, and 808.002, Priorities for Use of Government Supply Sources, May 10, 2016.

3) Procurement Policy Memorandum 2013-01, Sole Source Contracting under Title 38, U.S.C. Sections 8127 and 8128, enacted as part of the Veterans Benefits, Health Care and Information Technology Act of 2006.

2. **Background:**

a. On June 16, 2016, the U.S. Supreme Court reversed a lower court decision impacting the Department's original implementation of the Veterans First Contracting Program. In the *Kingdomware* case, the Court ruled that under 38 U.S.C. §8127(d), VA must set aside procurements for veteran-owned small businesses "if a contracting officer has a reasonable expectation that two or more small businesses owned and controlled by

veterans will submit offers and that the award can be made at a fair and reasonable price that offers the best value to the United States.” This is known as the “Rule of Two.” Major Supreme Court holdings in the *Kingdomware* case were as follows:

(1) §8127 is mandatory, not discretionary and its text requires the Department to apply the VA Rule of Two to all contracting determinations.

(2) The VA Rule of Two contracting procedures in 38 U.S.C. §8127(d) are not limited to those contracts necessary to fulfill the Secretary’s goals under §8127(a); and

(3) 38 U.S.C. §8127(d) applies to orders placed against the Federal Supply Schedules (FSS). An FSS order is a “contract” within the ordinary meaning of that term. Thus, FSS orders fall within the mandate in 38 U.S.C. §8127(d).

b. VA will continue to ensure the Department can effectively, efficiently, and economically procure goods and services for veterans in a timely manner, while also being good stewards of taxpayer dollars and meeting legal requirements. Accordingly, this PPM implements changes that are now required in VA’s acquisition policies and procedures, to ensure consistent execution of contracts to comply with the U.S. Supreme Court’s decision in *Kingdomware* and recent regulatory and statutory changes.

c. On October 17, 2018, the United States Court of Appeals for the Federal Circuit (the Federal Circuit) affirmed the lower court’s decision that the VA Rule of Two takes precedence over procuring products or services found on the AbilityOne Procurement List. Therefore, VA has deviated from VAAR 808.002 to reflect a change to require contracting officers to apply the VA Rule of Two to determine whether a requirement should be awarded to service-disabled veteran-owned small businesses (SDVOSBs) and veteran-owned small businesses (VOSBs) under the authority of 38 U.S.C. 8127-28, by using the preferences and priorities in VAAR subpart 819.70 prior to considering an award to an AbilityOne non-profit organization or the Federal Prison Industry, Inc. A Temporary Rule was issued in the Federal Register on June 24, 2019 at 84 FR 29389. The Temporary Rule is effective June 24, 2019 through July 1, 2021, and provides notification of Class Deviation from 808.002, Priorities for Use of Government Supply Sources and VAAR Subpart 808.6, Acquisition from Federal Prison Industries, Inc., dated May 20, 2019, which revised these subparts to reflect language consistent with the decision of the Federal Circuit.

d. Class Deviation from VA Acquisition Regulation Part 819—Small Business Programs and Part 852—Solicitation Provisions and Contract Clauses, dated July 12, 2019, incorporates the regulatory, legislative, and other required changes, and clarified the applicability of limitations on subcontracting and nonmanufacturer rule requirements to contracts awarded under the Veterans First Contracting Program (VFCP). These changes and clarifications are fully described in paragraph 7 of the class deviation.

e. The “Decision Tree” tool is removed as it is outdated and no longer applicable.

f. This PPM is being revised to provide clarity regarding the limitations on subcontracting and the non-manufacturer rule, and to align with the two class deviations discussed in paragraphs c. and d. above.

3. **Applicability:** This PPM applies to HCAs, VA Contracting Officers, and other VA acquisition professionals. Additionally, this PPM applies to all acquisitions conducted by VA or on behalf of VA utilizing Interagency Acquisitions in accordance with FAR subpart 17.5, VAAR subpart 817.5 and FAR 8.404(b)(2).

4. **Effective Date:** Immediately.

5. **Expiration Date:** This PPM is rescinded when incorporated into the VAAR or VA Acquisition Manual (VAAM) or otherwise rescinded.

6. **6. Key Definitions:** The following definitions are important to the discussion of internal VA policy, procedures, guidance and instruction.

a. *Program Office*—In this PPM, a program office refers to the VA organization that will be the end user of a contracting requirement. A program office normally provides direct services to the public, or provides administrative, legal, financial, technological, or other support to offices that provide direct services to the public. A program office is staffed by one or more Federal employees, either dedicated exclusively to the program or as a collateral duty; is managed by at least one decision maker able to commit to a course of action on behalf of the office; and has a funding source that can be obligated in support of a contracting requirement. Except when it is acquiring supplies and services for its own use, a contracting office is not a program office.

b. *Service-disabled veteran-owned small business (SDVOSB)*—has the same meaning as *service-disabled veteran-owned small business concern* defined in FAR 2.101, except for acquisitions authorized by 38 U.S.C. 8127 and 8128 for the Veterans First Contracting Program. These businesses must be listed as verified in the VIP database. In addition, some of the SDVOSB businesses listed in the VIP database may be owned and controlled by a surviving spouse. See definition of *surviving spouse* in VAAR 802.101. Additionally, the business will comply with VAAR subpart 819.70 and Small Business Administration (SBA) regulations regarding small business size and government contracting programs at 13 CFR part 121 and 125, including the nonmanufacturer rule and limitations on subcontracting requirements in 13 CFR 121.406 and 125.6, provided that any reference therein to a service-disabled veteran-owned small business concern or SDVO SBC, is to be construed to apply to a VA verified and VIP-listed SDVOSB. The nonmanufacturer rule and the limitations on subcontracting apply to all SDVOSB and VOSB set-asides and sole source contracts.

c. *VA Rule of Two*—means the process in 38 U.S.C. 8127(d) whereby a contracting officer of the Department, “shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans, if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers, and that the award can be made at a fair and reasonable price that offers the best value to the United States.” For purposes of this VA specific rule, a service-disabled veteran-owned small business (SDVOSB) or a veteran-owned small business (VOSB), must meet the eligibility requirements in 38 U.S.C. 8127(e), (f) and VAAR 819.7003 and be listed as verified in the Vendor Information Pages (VIP) database.

d. *Vendor Information Pages (VIP) database*—means the Department of Veterans Affairs Office of Small and Disadvantaged Business Utilization (OSDBU) Vendor Information Pages (VIP) database at <https://www.vip.vetbiz.va.gov/>. The site's database lists businesses that the VA Center for Verification and Evaluation (CVE) has determined eligible for the Veterans First Contracting Program.

e. *Veterans First Contracting Program*—means the program authorized by 38 U.S.C. 8127 and 8128 (Pub. L. 109-461 as amended) implemented under VAAR subpart 819.70. This program applies to all VA contracts (see FAR 2.101 for definition of contracts) including Blanket Purchase Agreements (BPAs) and orders against the Federal Supply Schedules (FSS), unless otherwise excluded by law.

f. *Veteran-owned small business (VOSB)*—has the same meaning as *veteran-owned small business concern* defined in FAR 2.101, except for acquisitions authorized by 38 U.S.C. 8127 and 8128 for the Veterans First Contracting Program. These businesses must be listed as verified in the VIP database. A VIP-listed SDVOSB, including those whose SDVOSB status derives from ownership and control by a surviving spouse, shall also be considered a VOSB. Additionally, the business will comply with VAAR subpart 819.70 and Small Business Administration (SBA) regulations regarding small business size and government contracting programs at 13 CFR part 121 and 125, including the nonmanufacturer rule and limitations on subcontracting requirements in 13 CFR 121.406 and 125.6, provided that any reference therein to a service-disabled veteran-owned small business concern or SBA SDVO SBC, is to be construed to also apply to a VA verified and VIP-listed VOSB. The nonmanufacturer rule and the limitations on subcontracting apply to all SDVOSB and VOSB set-asides and sole source contracts.

8. **Action Required:** To implement changes required as a result of the U.S. Supreme Court decision in *Kingdomware* and subsequent policy revisions, concerning the Veterans First Contracting Program and proper implementation of 38 U.S.C. §8127 and §8128. Contracting officers and members of the acquisition workforce shall comply with the following policy and procedures:

a. **Review of Existing HCA policy or guidance.** Additionally, effective with the issuance of this PPM, head of the contracting activities (HCAs) shall review all HCA level or lower policy, procedures, or guidance to ensure compliance with this PPM and the Class Deviations as noted.

b. General Information and Guidance.

1) ***Veterans First Contracting Program and the VA Rule of Two.*** In developing the acquisition strategy for any contract, the contracting officer shall take into consideration the impact of the VA Rule of Two and the best method of successfully implementing that requirement. Contracting officers must first research the VIP database to determine the availability of eligible sources in a specific NAICS code, then consider the VAAR, other internal agency policy, and the guidance in this PPM. This PPM seeks to aid contracting officers in evaluating alternatives, determining the most effective acquisition strategy to employ, and documenting that decision. VA has a wide range of effective acquisition vehicles and methodologies to employ while also providing opportunities to

verified SDVOSBs and VOSBs. Market research is a critical component for making these decisions.

The contracting officer shall evaluate alternatives, comprehensively document them in an acquisition plan as required by FAR part 7 and VAAR part 807 or internal agency guidance and determine the most effective acquisition strategy.

2) *VA strategic sourcing program and consideration of VA existing contracts before other sources.* The Veterans First Contracting Program is an important socioeconomic program that will help VA support our nation's veterans. Along with the mandate to consider SDVOSBs and VOSBs, VA, through previous acquisition reform initiatives, has implemented key strategic sourcing vehicles principally in the medical supplies, Federal Supply Classification (FSC) 65 & 66 area. Contracting officers shall consider all strategic sourcing vehicles and document in the market research report that these vehicles were examined when performing market research. Contracting officers shall consider existing VA contracts and apply the VA Rule of Two in accordance with VAAR 819.7005 and 819.7006 as well as VAAR 808.004-70, Use of Non-Mandatory Sources by VA and VAAR 808.404-70, Use of Federal Supply Schedules—the Veterans First Contracting Program.

3) *Market Research/Acquisition Planning.* Market research and acquisition planning are critical functions in promoting the award of contracts to SDVOSBs and VOSBs. FAR part 7, Acquisition Planning, and FAR part 10, Market Research, as supplemented by the VAAR, provide contracting officers guidance on how to appropriately apply the VA Rule of Two.

FAR part 10 requires agencies to conduct market research. Market research is a collaborative responsibility. The contracting officer is ultimately responsible for ensuring the market research supports his or her determination whether there is a reasonable expectation of receiving two or more offers from eligible SDVOSBs/VOSBs and that award can be made at a fair and reasonable price that offers best value to VA . OSDBU reviews market research as part of its Small Business Procurement Review Process and may be able to provide insights into the results of market research from previous acquisitions, as well as the results of OSDBU outreach efforts.

VA contracting officers and program offices should use the following procedures during acquisition planning and consider SDVOSBs and VOSBs in the contracting order of priority set forth in VAAR 819.7004 for each procurement requirement:

a) Market Research Roles and Responsibilities

(i) **Program Offices.** Program offices should conduct initial market research as part of their effort to develop an identified need into a specific contracting requirement. Program offices are encouraged to use the VIP database to conduct market research to identify verified SDVOSBs and VOSBs. Before a specific requirement is defined, program offices are encouraged to engage with industry. Attendance at small business conferences and outreach events, meetings with small business vendors, engagement with professional and trade associations, and similar activities can lead to a more fully developed acquisition package. Program offices shall also supply information about an

anticipated need to VA's Forecast of Contracting Opportunities and provide contact information to enable vendors to meet with program office personnel.

(ii) **OSDBU.** OSDBU has a statutory mandate to make recommendations to the contracting officer whether an action should be set-aside, and this decision is documented using VA Form 2268, Small Business Program and Contract Bundling Review. This review process is more effective when conducted collaboratively and early, both as the program office develops its acquisition package and as the contracting officer conducts the acquisition. As part of its VA Form 2268 reviews, OSDBU examines market research developed as part of other acquisitions from other offices. OSDBU seeks to make this information available to the extent possible, to avoid duplication of efforts among multiple offices pursuing similar requirements.

(iii) **Contracting Officer.** The contracting officer shall coordinate market research conducted on a specific acquisition package with the program office. This may include use of pre-solicitation and sources sought notices, Requests for Information (RFIs), draft Requests for Proposals (RFPs), pre-proposal conferences, site visits or other acquisition-specific approaches. The contracting officer is responsible for managing information on a specific acquisition package to ensure compliance with procurement integrity requirements (see FAR 3.104). The contracting officer shall prepare a market research report to document market research findings. The scope of this memorandum may vary depending on the magnitude or complexity of the acquisition. This memorandum shall be included when the VA Form 2268 is submitted for review.

b) **Industry Engagement.** Contracting officers shall comply with the Acting Chief Acquisition Officer's memorandum, "Encouraging Industry Engagement", December 22, 2015, by initiating a proactive, appropriate and robust dialogue with industry.

c) **Market Research.** During the acquisition planning process, contracting officers, in cooperation with program offices, should survey the market to determine capabilities (lead-times, production, delivery, and estimated cost).

The use of sources sought notices to identify SDVOSBs and VOSBs and sending requests for information to firms within the VIP is encouraged in conducting market research and should be used when appropriate to identify the capable businesses most likely to submit an offer. In performing market research, the contracting officer must use the VIP database to identify verified SDVOSBs or VOSBs that may meet VA eligibility requirements. The assessment of those businesses must consist of an examination of entities contained in the VIP database when determining whether VA must set the procurement aside under the VA Rule of Two. The assessment and all market research need to be completed and thoroughly documented in the contract file, to memorialize compliance with the VA Rule of Two.

As companies grow or expand into new fields, they may exceed the NAICS size standards. Therefore, it is important that the contracting officer verify that an otherwise eligible firm meets the size standard applicable to the NAICS used for the particular procurement. Contracting officers should verify the size standard in System for Award Management (SAM) to confirm eligibility.

Contracting officers shall ensure market research that considers SDVOSBs/VOSBs is thoroughly conducted and comprehensively documented in the contract file. Contracting officers shall review the market research conducted and documented to ensure compliance with the VA Rule of Two requirement

If market research demonstrates that offers are likely to be received from two or more capable and verified SDVOSBs or VOSBs and award will be made at a fair and reasonable price that is the best value to the United States, the action should be appropriately set aside in the contracting order of priority set forth in VAAR 819.7004. Contracting officers shall also ensure SDVOSBs or VOSBs have been listed as verified in the VIP database at the time of offer submission and before award on an SDVOSB or VOSB set-aside. Supporting documentation must be maintained in the contract file in the Electronic Contract Management System (eCMS).

d) **Evaluation of Acquisition Strategy.** The contracting officer shall identify and consider using existing contracts where the requirement is within scope of the existing contract and represents the best business solution. The contracting officer will apply the results of market research to determine if two or more verified SDVOSBs or VOSBs can reasonably be expected to submit offers and that award can be made at a fair and reasonable price offering the best value to the Government. If an existing vehicle can support a set-aside, the CO shall set-aside on that vehicle if it represents the best business solution. If no existing vehicle can support a set-aside, the contracting officer should pursue an open market set-aside. Alternatively, if otherwise justifiable and appropriate, consider use of a sole source award as authorized by 38 U.S.C. 8127(c). The contracting officer shall document this decision on VA Form 2268 and submit it with supporting documentation, in accordance with the OSDDBU Small Business Procurement Review Program (PRP) Policy memorandum dated June 22, 2016.

e) **VA Form 2268, Small Business Reviews.** The contracting officer will document the market research results on the VA Form 2268. The OSDDBU Small Business Procurement Review Program (PRP) Policy memorandum provides the most recent information on which requirements must have an OSDDBU review and requires review of acquisitions not set-aside for SDVOSBs or VOSBs. For submission instructions for eCMS, alternative submission guidelines, and OSDDBU's VA Form 2268 Decision Matrix see <http://vaww.va.gov/osdbu/ast/2268.asp>.

c. **Policy.** Contracting officers shall take the following actions to ensure compliance.

1) **Verification of GSA FSS SDVOSBs/VOSBs.** The General Services Administration (GSA) FSS program does not require SDVOSBs or VOSBs to be verified in VIP; however, 38 U.S.C. §8127(e) requires SDVOSBs and VOSBs to be verified in VIP. Therefore, if an RFQ for an order or BPA under any FSS contract (GSA or VA included) is being set-aside for SDVOSBs or VOSBs, contracting officers shall include a requirement in the solicitation that only SDVOSBs or VOSBs verified in the VIP database when an offer is submitted and at the time of contract award will be considered for award and unverified firms will be considered ineligible for award.

2) **Limitations on Subcontracting and Nonmanufacturer rule.** The Small Business Act and the Small Business Administration's regulations impose performance

requirements (limitations on subcontracting) on firms that are awarded set aside contracts. Any SDVOSB or VOSB that proposes to furnish an end product it did not manufacture (a “nonmanufacturer”) must meet the requirements in 13 CFR 121.406 to receive a benefit under the Veterans First Contracting Program. Contracting officers are reminded that any SDVOSB or VOSB set-aside is subject to the Limitations on Subcontracting requirements included in 13 CFR 125.6 and VAAR 852.219-10, VA Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside, or VAAR 852.219-11, VA Notice of Total Veteran-Owned Small Business Set-Aside, respectively. Any market research must take this into consideration. Note: Class Deviation—Authority to approve the submission of a request for a Nonmanufacturer Rule Waiver to the Small Business Administration (SBA) and use of other than competitive procedures or restricted competition as defined in 38 U.S.C. §8127, for procurements where SBA has issued a class waiver to the Nonmanufacturer Rule, dated February 17, 2017; and Class Deviation from VA Acquisition Regulation Part 819—Small Business Programs and Part 852—Solicitation Provisions and Contract Clauses, dated July 12, 2019, provide more specific guidance.

3) Awarding contracts on the basis of competition.

a) The contracting officer will review the VIP database to determine if two or more verified SDVOSBs/VOSBs are listed in the NAICS code assigned to the acquisition and are capable of performing the requirements.

b) Appropriate market research shall be further conducted and documented to determine if the SDVOSBs/VOSBs identified are qualified and capable of performing the requirement(s) at fair and reasonable prices.

c) Document results on the VA Form 2268, as well as any required Acquisition Plan and Market Research Report as required by FAR part 7, 10, and VAAR part 807, VAAR part 810, and agency guidance.

d) If the procurement is not set aside for SDVOSBs or VOSBs, submit the VA Form 2268 for review and approval in accordance with the latest OSDBU Small Business Procurement Review Program Policy memorandum.

e) If two or more verified SDVOSBs or VOSBs are awardees on an existing BPA, Federal Supply Schedule, or existing multiple award IDIQ, the contracting officer may consider setting the procurement aside using that vehicle or other contract vehicles where two or more verified SDVOSBs or VOSBs are awardees.

f) Ensure the solicitation includes the requirement for offerors to be listed as verified in VIP. Offers from unverified SDVOSBs or VOSBs will not be evaluated. Supporting documentation must be maintained in the contract file in eCMS.

4) To promote competition among SDVOSB and VOSB firms:

a) Contracting officers shall obtain competition to the maximum extent practicable when contracting with SDVOSBs and VOSBs. While contracting officers may use other than full and open competition when awarding to SDVOSB and VOSB firms under 38 U.S.C. 8127(b) and (c), the focus should be on competing requirements among

SDVOSBs and VOSBs to achieve a fair and reasonable price. For all requirements in excess of the simplified acquisition threshold, VA contracting officers shall consider using the competitive set-aside procedures in VAAR 819.7005 or 819.7006, as appropriate, if the market research required by VAAR Part 810 shows a reasonable expectation that offers will be received from two or more eligible firms and award will be made at a fair and reasonable price that offers the best value to the United States. Partial set-asides should be considered where appropriate.

b) Contracting officers may use the non-competitive (sole source) procedures authorized in VAAR 819.7007 or 819.7008 up to \$5,000,000, as appropriate, subject to the review and approval of the designated procurement official outlined in FAR 6.304. The justification must comply with the format requirements at FAR 6.303-2 and all requirements at VAAR 819.7007 or 819.7008.

d. Compliance with Other Statutory Mandates

VA has a continuing requirement to comply with all statutory mandates. When a contracting officer is required by law to obtain goods and services from a specific source, the contracting officer shall carry out that mandate.

However, the Temporary Rule issued in the Federal Register on June 24, 2019 at [84 FR 29389](#), effective June 24, 2019 through July 1, 2021, provides notification of Class Deviation from 808.002, Priorities for Use of Government Supply Sources and VAAR Subpart 808.6, Acquisition from Federal Prison Industries, Inc., dated May 20, 2019. The Temporary Rule requires that contracting officers shall apply the VA Rule of Two to determine whether a requirement should be awarded to veteran-owned small businesses under the authority of 38 U.S.C. 8127-28, by using the preferences and priorities in subpart 819.70. If the VA Rule of Two cannot be satisfied and an award is not made to a VIP-listed and verified service-disabled veteran-owned small business (SDVOSB)/veteran-owned small business (VOSB) as provided in subpart 819.70, those sources remain mandatory source in accordance with FAR 8.002.

9. Questions or Concerns: Please direct questions regarding this PPM to the Office of Acquisition and Logistics (003A), Procurement Policy and Warrant Management Service (003A2A), via email at VA.Procurement.Policy@va.gov or (202) 632-5288.

/s/
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