

Date: May 20, 2019

From: Deputy Senior Procurement Executive

Subj: Class Deviation from VAAR 808.002, Priorities for Use of Government Supply Sources and VAAR Subpart 808.6, Acquisition from Federal Prison Industries, Inc. (VIEWS 00217190)

To: Heads of the Contracting Activities

**1. Purpose.** To issue a Class Deviation from Department of Veterans Affairs Acquisition Regulation (VAAR) 808.002, Priorities for Use of Government Supply Sources, and VAAR subpart 808.6, Acquisition from Federal Prison Industries, Inc., in accordance with Federal Acquisition Regulation (FAR) 1.404, Class Deviations, and Department of Veterans Affairs Acquisition Regulation (VAAR) 801.404. This revised Class Deviation supersedes Class Deviation from VAAR 808.002, Priorities for Use of Mandatory Government Sources, dated February 9, 2018, and revises VAAR 808.002 and subpart 808.6 to reflect language consistent with the decision of the United States Court of Appeals for the Federal Circuit (the Federal Circuit) in *PDS Consultants, Inc., v. The United States, Winston-Salem Industries for the Blind*, issued October 17, 2018.

**2. Summary.** The Federal Circuit found that the *VA Rule of Two* takes precedence over procuring products or services found on the AbilityOne Procurement List. Therefore, VA is deviating 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 subpart 819.70 prior to considering an award to an AbilityOne non-profit organization or the Federal Prison Industry, Inc.

**3. VAAR Sections Impacted.** 808.002, Priorities for use of Government supply sources, and subpart 808.6, Acquisition from Federal Prison Industries, Inc. (FPI).

**4. Effective Date.** Immediately.

**5. Expiration Date.** This deviation expires when incorporated in the VAAR, or is otherwise rescinded.

**6. Applicability.** This class deviation applies to all VA contracts (see definition of contract at FAR 2.101).

**7. Exception.** None.

**8. Background.** On May 20, 2019, the Federal Circuit issued a mandate effectuating its October 17, 2018 decision in *PDS Consultants, Inc., v. The United States, Winston-Salem*

*Industries for the Blind (PDS Consultants)*. In the decision, the Federal Circuit noted that under 38 U.S.C. § 8128(a), the Secretary of Veterans Affairs, when “procuring goods and services pursuant to a contracting preference under [title 38] *or any other provision of law...shall give priority* to a small business concern owned and controlled by veterans, if such business concern meets the requirements of that contracting preference.” (emphasis added). The Federal Circuit noted that the phrase “*or any other provision of law*” by its terms encompasses the Javits-Wagner O’Day Act (JWOD), 41. U.S.C. § 8504. Therefore, the Federal Circuit found that where a product or service is on the Procurement List and ordinarily would result in the contract being awarded to a nonprofit qualified under the JWOD, the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the Act), Pub. L. No 109-461, 120 Stat. 3403, 3431-35 (2006) mandates that priority be given to service-disabled veteran-owned small businesses and veteran-owned small businesses.

**a. Current VAAR Policy.** VAAR 808.002 and subpart 808.6 currently state that supplies and services on the AbilityOne Procurement List and supplies provided by Federal Prison Industries, Inc., are mandatory with certain caveats.

**b. Need for Deviation.** This Class Deviation is needed to reflect language consistent with the Federal Circuit’s decision in *PDS Consultants, Inc.*, that the Veterans First Contracting Program takes precedence over AbilityOne and Federal Prison Industries.

The mandate issued by the Federal Circuit created a binding circuit precedent that, when a product or service is on the AbilityOne Procurement List and ordinarily would result in award under the JWOD program, the Act instead unambiguously requires that priority be given to Veteran-owned small businesses.

Though the Federal Prison Industries (FPI) priority for use of mandatory Government sources set forth at FAR 8.002(a)(iii) and FAR subpart 8.6 was not specifically at issue in the Federal Circuit case, the application of the rationale in the cited case would logically apply to FPI in relation to the Act. For supplies, FPI is a higher priority than the AbilityOne (JWOD) priority at FAR 8.002(a)(iv) and FAR subpart 8.7. VA previously amended the VAAR to allow the agency the discretion to award to a veteran-owned small business when award otherwise would have been made to FPI.

**c. New Policy.** The new policy provides that—

- Contracting officers shall apply the VA Rule of Two, as implemented in VAAR subpart 819.70, prior to awarding any contract to AbilityOne non-profit organizations or to Federal Prison Industries, Inc.
- For AbilityOne, if an award is not made to an eligible Vendor Information Pages (VIP)-listed and verified SDVOSB or VOSB under VAAR subpart 819.70, the priority use of AbilityOne applies and supplies and services on the Procurement List are mandatory sources.

- For FPI, if an award is not made to an SDVOSB/VOSB as provided in subpart 819.70, FPI remains a mandatory supply source in accordance with FAR 8.002.
- Consistent with FAR 8.002(b), contracting officers may use a source other than those listed in VAAR 808.002(a), when the need for supplies or services is of an unusual and compelling urgency, and when justified.
- VAAR 808.002 title is revised to reflect the current title at FAR 8.002, "Priorities for use of mandatory Government sources" in lieu of the existing VAAR title now reflected in the Code of Federal Regulations at 808.002.

**9. Additional information.** Direct questions or concerns regarding this deviation to the Office of Acquisition and Logistics (003A), Procurement Policy and Warrant Management Service (003A2A) via email at [VA.Procurement.Policy@va.gov](mailto:VA.Procurement.Policy@va.gov) or (202) 632-5288.

/s/

D. Edward Keller, Jr.

Attachment

Class Deviation VAAR 808.002, Priorities for Use of Government Supply Sources and VAAR Subpart 808.6, Acquisition from Federal Prison Industries, Inc.

## Attachment

### CLASS DEVIATION FROM VAAR 808.002, PRIORITIES FOR USE OF GOVERNMENT SUPPLY SOURCES

#### PART 808—REQUIRED SOURCES OF SUPPLIES AND SERVICES

##### **808.002 Priorities for use of mandatory Government sources.**

(a) Contracting activities shall satisfy requirements for supplies and services from or through the mandatory sources listed below in descending order of priority:

(1) Supplies.

(i) VA inventories including the VA supply stock program (41 CFR 101-26.704) and VA excess.

(ii) Excess from other agencies (see FAR subpart 8.1).

(iii) Federal Prison Industries, Inc. (see VAAR 808.603). Prior to considering award of a contract to Federal Prison Industries, Inc, 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 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, FPI remains a mandatory source in accordance with FAR 8.002.

(iv) *Supplies that are on the Procurement List* maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled, known as AbilityOne (FAR subpart 8.7). Prior to considering award of a contract under the AbilityOne program, 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 an award is not made to a VIP-listed and verified SDVOSB/VOSB as provided in subpart 819.70, AbilityOne remains a mandatory source in accordance with FAR 8.002. All new VA requirements must be approved by the Chief Acquisition Officer, via the Senior Procurement Executive, before contacting the Committee to request addition of new items to the Procurement List.

(v) Wholesale supply sources, such as stock programs of the General Services Administration (GSA) (see 41 CFR 101-26.3), the Defense Logistics Agency (see 41 CFR

101-26.6), the Department of Veterans Affairs (see 41 CFR 101-26.704), and military inventory control points.

(2) *Services that are on the Procurement List* maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled, known as AbilityOne (FAR subpart 8.7). Prior to considering award of a contract under the AbilityOne program, 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 an award is not made to a VIP-listed and verified SDVOSB/VOSB as provided in subpart 819.70, AbilityOne remains a mandatory source in accordance with FAR 8.002. All new VA requirements must be approved by the Chief Acquisition Officer, via the Senior Procurement Executive, before contacting the Committee to request addition of new items to the Procurement List.

(b) *Unusual and compelling urgency*. The contracting officer may use a source other than those listed in paragraph (a) of this section when the need for supplies or services is of an unusual and compelling urgency (see FAR 6.302-2, 8.405-6 and 13.106-1 for justification requirements).

**CLASS DEVIATION FROM VAAR SUBPART 808.6, ACQUISITION FROM FEDERAL PRISON INDUSTRIES, INC. (FPI)**

**PART 808—REQUIRED SOURCES OF SUPPLIES AND SERVICES**

**Subpart 808.6—Acquisition from Federal Prison Industries, Inc. (FPI)**

**808.603 Purchasing priorities.**

A waiver from FPI is not needed when comparable supplies and services are procured in accordance with subpart 819.70.