

Date: July 12, 2019

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

Subj: Class Deviation from VA Acquisition Regulation Part 819—Small Business Programs and Part 852—Solicitation Provisions and Contract Clauses (VIEWS 00079695)

To: Heads of the Contracting Activities

1. Purpose. To issue a VA Acquisition Regulation (VAAR) class deviation from the following sections: 819.7001, General; 819.7003, Eligibility; 819.7009, Contract clauses; 852.219-10, VA Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside; and, 852.219-11, VA Notice of Total Veteran-Owned Small Business Set-Aside, in accordance with VAAR 801.404. This class deviation supersedes the aforementioned sections and effectively updates the language set forth in Class Deviation—Veterans First Contracting Programs (VFCP 2016), Attachment 9—VAAR Part 819, Small Business Programs, and Attachment 10—VAAR Part 852, Solicitation Provisions and Contract Clauses, dated July 25, 2016. The remaining text in Attachments 9 and 10, in Class Deviation VFCP 2016, continues to be in effect.

2. VAAR Sections Impacted. VAAR 819.7001, 819.7003, 819.7009, 852.219-10, and 852.219-11.

3. Effective Date. Immediately.

4. Expiration Date. This deviation expires once incorporated into the VAAR or the Veterans Affairs Acquisition Manual (VAAM), or is otherwise rescinded.

5. Applicability. This class deviation applies to all VA contracts. Additionally, this deviation applies to contracts conducted by VA or on behalf of VA, using interagency acquisitions in accordance with Federal Acquisition Regulation (FAR) subpart 17.5, VAAR subpart 817.5, and FAR 8.404(b)(2), and any other arrangement with any governmental entity to acquire goods and services by contract on behalf of the VA.

6. Background. The Small Business Administration (SBA), in its final rule published in the Federal Register at 81 FR 34243 on May 31, 2016, changed and standardized the limitations on subcontracting and the nonmanufacturer rule with which small businesses must comply under Government contracts awarded pursuant to the set-aside or sole source authorities of the Small Business Act.

a. Current VAAR Policy. Current policy does not clearly reflect SBA's current interpretation regarding the applicability of the limitations on subcontracting, to include application of the nonmanufacturer rule.

b. Need for Deviation. This VAAR class deviation incorporates the SBA’s regulatory and legislative changes and clarifies the applicability of limitations on subcontracting and nonmanufacturer requirements to contracts awarded under the Veterans First Contracting Program (VFCP). A separate FAR class deviation will implement changes affecting other small business and socioeconomic programs implemented under FAR part 19. Updates are needed to ensure VA policy is consistent with SBA guidance while recognizing the unique VA legislative differences (e.g., Veteran Owned Small Business [VOSB] set-asides, Vendor Information Pages [VIP] listing) that do not exist in the FAR or SBA regulations. This deviation clarifies application of the SBA limitations on subcontracting requirements and the nonmanufacturer rule, on contracts awarded to Service Disabled Veteran Owned Small Businesses (SDVOSBs) and VOSBs under the VFCP. The deviation also provides clarifying language to ensure that only VIP-listed SDVOSBs are considered eligible and/or “similarly situated” when SDVOSBs are referenced in the SBA regulations and clarifies that VOSBs are subject to the same requirements as SDVOSBs. In addition, the deviation updates joint venture requirements under the VFCP and makes other conforming changes as set forth in paragraph 6c below.

c. New Policy. The following VAAR sections 819.7001, 819.7003, 819.7009, 852.219-10, and 852.219-11 are revised as follows:

(1) **819.7001, General.** Paragraph (a) is revised to introduce the terminology, “service-connected disability” introduced by the Fiscal Year 2017 National Defense Authorization Act, Public Law 114-328, and link it to SDVOSB and VOSB terminology as used in the VFCP. Paragraph (b) is revised to clearly state that eligible SDVOSBs qualify for VOSB preferences under VAAR subpart 819.70.

(2) **819.7003, Eligibility.** Paragraph (a) is revised to update SBA regulation citations at 13 CFR regarding size and eligibility referenced in this section. Paragraph (c) is revised to remove the citation to FAR part 19, to update the SBA regulation citation, and to clarify that joint ventures must include VIP-listed SDVOSBs and VOSBs. Paragraph (c) is also revised to conform to SBA regulations regarding joint ventures with approved large business mentors in a mentor-protégé agreement approved by SBA, and to add the requirement that the joint venture must also be listed as verified in the VIP database. The existing paragraph (d) is revised to remove the FAR citation and to reference the general SBA regulation and VAAR subpart 819.70. A new paragraph (e) is added to update SBA related references and requirements pertaining to the nonmanufacturer rule and limitations on subcontracting. Specifically, this section provides that a contract awarded under the VFCP is subject to the SBA nonmanufacturer rule and limitations on subcontracting requirements in 13 CFR 121.406 and 125.6, and that only VIP-listed SDVOSBs are considered eligible or “similarly situated” in an SDVOSB set-aside. In other words, the nonmanufacturer rule and the limitations on subcontracting requirements apply to all SDVOSB and VOSB set-asides or sole source contracts.

In addition, VOSBs participating in the VFCP are subject to the same limitations on subcontracting that apply to an SDVOSB, and only VIP-listed SDVOSBs/VOSBs are considered eligible and/or “similarly situated” in a VOSB set-aside. Current paragraphs (e) and (f) are renumbered (f) and (g), respectively, with no changes.

(3) **819.7009, Contract clauses.** Removes the words “open market” when prescribing the clauses at 852.219-10, VA Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside; and 852.219-11, VA Notice of Total Veteran-Owned Small Business Set-Aside, since the clauses are to be used for all set-asides and sole source acquisitions, including Federal Supply Schedule orders. Revised the prescription to include set-aside or sole source contracts awarded under this section. The last sentence is added to include multiple-award contracts when orders may be set aside for service-disabled veteran-owned small business concerns as described in FAR 8.405-5 and FAR 16.505(b)(2)(i)(F).

(4) **852.219-10, VA Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside (JUL 2019) (DEVIATION).** Language is revised to: 1) state that offers are solicited only from eligible SDVOSBs; 2) clarify that only VIP-listed SDVOSBs are considered eligible and/or “similarly situated”; 3) clarify that awards include orders under multiple-award contracts; 4) clarify that an independent contractor shall be considered a subcontractor; 5) update the SBA Title 13 CFR reference citations and requirement to comply with SBA regulations pertaining to limitations on subcontracting and the nonmanufacturer rule; 6) make other changes to comport with current SBA terminology; 7) clarify that the limitations on subcontracting requirements, including the nonmanufacturer rule, apply to all VA SDVOSB set-aside or sole source contracts; and 8) make other administrative and technical changes described in the sections included in this deviation.

(5) **852.219-11, VA Notice of Total Veteran-Owned Small Business Set-Aside (JUL 2019) (DEVIATION).** Language is revised to: 1) state that offers are solicited only from eligible VOSBs; 2) clarify references to SDVOSB/VOSB concerns; 3) clarify that only VIP-listed SDVOSBs/VOSBs are considered eligible and/or “similarly situated;” 4) clarify that awards include orders under multiple-award contracts; 5) clarify that an independent contractor shall be considered a subcontractor; 6) update the SBA Title 13 CFR reference citations and requirement to comply with SBA regulations pertaining to limitations on subcontracting and the nonmanufacturer rule; and 7) clarify that the limitations on subcontracting requirements, including the nonmanufacturer rule, apply to all VA VOSB set-aside or sole source contracts.

Revisions are identified by a vertical line in the right margin of the attached class deviation.

Page 4

Class Deviation from VAAR Part 819—Small Business Programs and Part 852—
Solicitation Provisions and Contract Clauses

7. Additional Information. Direct questions 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 or (202) 632-5288.

/s/

Angela Billups, Ph.D.

Attachments—Class Deviation VAAR Part 819—Small Business Programs (JUL 2019) (DEVIATION); Class Deviation—VAAR Part 852—Solicitation Provisions and Contract Clauses (JUL 2019) (DEVIATION)

CLASS DEVIATION

VAAR PART 819—SMALL BUSINESS PROGRAMS (JUL 2019) (DEVIATION)

819.7001 General.

(a) Sections 502 and 503 of Public Law 109-461, the Veterans Benefits, Health Care, and Information Technology Act of 2006, as amended (38 U.S.C. 8127-8128), authorize a VA specific acquisition program to increase contracting opportunities for eligible small business concerns owned and controlled by veterans with service connected disabilities and small business concerns owned and controlled by veterans. These businesses are also referred to as service-disabled veteran-owned small businesses (SDVOSBs) and veteran-owned small businesses (VOSBs). SDVOSBs/VOSBs must have their ownership and control verified by VA and be listed in the Vendor Information Pages (VIP) at the time of submission of offers/quotes, and prior to award of any contracts.

(b) The program as implemented in this subpart shall be known as the Veterans First Contracting Program (VFCP). The purpose of the program is to provide contracting assistance to SDVOSBs/VOSBs so they can fully participate in the VA contracting process. Eligible SDVOSBs qualify for VOSB preferences under this subpart.

(c) 38 U.S.C. 8127 (b), (c) and (d) provide the authority for VA contracting officers to make awards to verified SDVOSBs/VOSBs using set-asides, as well as other than full and open competition (sole source), when certain conditions are met.

(d) Contracting officers shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans (see 819.7005 and 819.7006), to the maximum extent practicable. The contracting officer may also use other SDVOSB/VOSB preferences in this subpart, as appropriate.

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819.7003 Eligibility.

(a) SDVOSB/VOSB size eligibility, status challenges, and appeals, are governed by SBA regulations at 13 CFR parts 121, 125 and 134, except where expressly directed otherwise by this part, or 38 CFR part 74 – Veterans Small Business Regulations.

(b) At the time of submission of offers/quotes, and prior to award of any contracts, the offeror must represent to the contracting officer that it is a—

(1) SDVOSB or VOSB eligible under this subpart;

(2) Small business concern under the North American Industry Classification System (NAICS) code assigned to the acquisition; and

(3) SDVOSB/VOSB listed as verified in VA Vendor Information Pages (VIP) database at: <https://www.vip.vetbiz.va.gov>.

(c) A joint venture may be considered eligible if it meets the requirements in 13 CFR part 125 and is listed as verified in the VIP database (see 38 CFR 74.5(b).

(1) At least one member of the joint venture is a verified SDVOSB or VOSB and makes the representations in paragraph (b) of this section;

(2) Except for a large firm participating in a mentor-protégé agreement approved by SBA under 13 CFR 125.9(d)(1), each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement;

(3) The joint venture meets the requirements of 13 CFR 125.18 (b), modified to include VIP verified VOSBs where this CFR section refers to a service-disabled veteran-owned small business concern (SDVO SBC).

(4) The joint venture is listed as verified in the VIP database.

(d) To receive a benefit under the Veterans First Contacting Program (VFCP), an otherwise eligible SDVOSB/VOSB must meet Small Business Administration (SBA) regulations requirements for small business size and government contracting programs at 13 CFR part 121 and part 125, including the nonmanufacturer requirements at 13 CFR 121.406(b).

(e) A contract awarded under this subpart is subject to the SBA limitations on subcontracting requirements in 13 CFR 125.6, provided that only VIP-listed SDVOSBs are considered eligible and/or “similarly situated” under an SDVOSB sole source or set-aside. In addition, a VOSB is subject to the same limitations on subcontracting that apply to an SDVOSB, and only VIP-listed veteran-owned small businesses are considered eligible and/or “similarly situated” under a VOSB sole source or set-aside. The nonmanufacturer rule (see 13 CFR 121.406) and the limitations on subcontracting requirements apply to all SDVOSB and VOSB set-aside and sole source contracts.

(f) In some instances, SDVOSB eligibility may be extended to businesses owned and operated by surviving spouses, as set forth in 802.101.

(g) Pursuant to 38 USC 8127(g), any business concern that is determined by VA to have willfully and intentionally misrepresented its SDVOSB/VOSB status is subject to debarment from contracting with the Department for a period of not less than five years. This debarment includes all principals in the business. See 809.406, Debarment.

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819.7009 Contract clauses.

The contracting officer shall insert clause 852.219-10, VA Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside, or clause 852.219-11, VA Notice of Total Veteran-Owned Small Business Set-Aside, as applicable, in solicitations and contracts, including BPAs and orders, for acquisitions that are evaluated, set-aside or awarded on a sole source basis under this subpart. This includes multiple-award contracts when orders may be set aside for service-disabled veteran-owned small business concerns as described in FAR 8.405-5 and FAR 16.505(b)(2)(i)(F).

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NOTE: * * * * * denotes that the remaining sections between the cited VAAR text are unchanged.

CLASS DEVIATION

VAAR PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES (JUL 2019) (DEVIATION)

852.219-10 VA Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside

As prescribed in 819.7009, insert the following clause:

VA NOTICE OF TOTAL SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS SET-ASIDE (JUL 2019) (DEVIATION)

(a) *Definition.* For the Department of Veterans Affairs, “Service-disabled veteran-owned small business concern or SDVOSB”:

(1) Means a small business concern:

(i) Not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled Veterans or eligible surviving spouses (see VAAR 802.101, Surviving Spouse definition);

(ii) The management and daily business operations of which are controlled by one or more service-disabled Veterans (or eligible surviving spouses) or, in the case of a service-disabled Veteran with permanent and severe disability, the spouse or permanent caregiver of such Veteran;

(iii) The business meets Federal small business size standards for the applicable North American Industry Classification System (NAICS) code identified in the solicitation document;

(iv) The business has been verified for ownership and control pursuant to 38 CFR part 74 and is so listed in the Vendor Information Pages (VIP) database (<https://www.vip.vetbiz.va.gov>); and

(v) 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 (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.

(2) “Service-disabled Veteran” means a Veteran, as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16).

(b) *General.*

(1) Offers are solicited only from eligible service-disabled veteran-owned small business concerns. Only VIP-listed service-disabled veteran-owned small business concerns (SDVOSBs) may submit offers in response to this solicitation. Offers received from concerns that are not VIP-listed service-disabled veteran-owned small business concerns shall not be considered.

(2) Any award resulting from this solicitation shall be made to a VIP-listed service-disabled veteran-owned small business concern that meets the size standard for the applicable NAICS code.

(c) *Representation.* By submitting an offer, the prospective contractor represents that it is an eligible SDVOSB as defined in this clause, 38 CFR part 74, and VAAR subpart 819.70. Pursuant to 38 U.S.C. 8127(e), only VIP-listed SDVOSBs are considered eligible. Therefore, any reference in 13 CFR part 121 and 125 to a service-disabled veteran-owned small business concern (SDVO SBC), is to be construed to apply to a VA verified and VIP-listed SDVOSB and only such concern(s) qualify as similarly situated. The offeror must also be eligible at the time of award.

(d) *Agreement.* When awarded a contract (see FAR 2.101, Definitions), including orders under multiple-award contracts, or a subcontract, an SDVOSB agrees that in the performance of the contract, the SDVOSB shall comply with requirements in VAAR subpart 819.70 and SBA regulations on 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 part 121.406 and 125.6, provided that for purposes of the limitations on subcontracting, only VIP-listed SDVOSBs shall be considered eligible and/or "similarly situated" (i.e., a firm that has the same small business program status as the prime contractor). An independent contractor shall be considered a subcontractor. An otherwise eligible firm further agrees to the following:

(1) *Services*. In the case of a contract for services (except construction), it will not pay more than 50% of the amount paid by the government to it to firms that are not VIP-listed SDVOSBs.

(2) *Supplies or products*.

(i) In the case of a contract for supplies or products (other than from a nonmanufacturer of such supplies), it will not pay more than 50% of the amount paid by the government to it to firms that are not VIP-listed SDVOSBs.

(ii) In the case of a contract for supplies from a nonmanufacturer, it will supply the product of a domestic small business manufacturer or processor, unless a waiver as described in 13 CFR 121.406(b)(5) is granted.

(3) *General construction*. In the case of a contract for general construction, it will not pay more than 85% of the amount paid by the government to it to firms that are not VIP-listed SDVOSBs.

(4) *Special trade contractors*. In the case of a contract for special trade contractors, it will not pay more than 75% of the amount paid by the government to it to firms that are not VIP-listed SDVOSBs.

(5) *Subcontracting*. Any work that a VIP-listed SDVOSB subcontractor further subcontracts will count towards the percent of subcontract amount that cannot be exceeded. For supply or construction contracts, cost of materials is excluded and not considered to be subcontracted. For mixed contracts and additional limitations, refer to 13 CFR 125.6.

(e) *Joint ventures*. A joint venture may be considered an SDVOSB if the joint venture is listed in VIP and complies with the requirements in 13 CFR 125.18(b), provided that any reference therein to service-disabled veteran-owned small business concern or SDVO SBC, is to be construed to mean a VIP-listed SDVOSB. A joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (d) of this clause will be performed by the aggregate of the joint venture participants.

(f) *Precedence*. For any inconsistencies between the requirements of the SBA program for service-disabled veteran-owned small business concerns and the VA Veterans First Contracting Program, as defined in VAAR subpart 819.70 and this clause, the VA Veterans First Contracting Program requirements have precedence.

(End of clause)

852.219-11 VA Notice of Total Veteran-Owned Small Business Set-Aside.

As prescribed in 819.7009, insert the following clause:

VA NOTICE OF TOTAL VETERAN-OWNED SMALL BUSINESS SET-ASIDE (JUL 2019) (DEVIATION)

(a) *Definition.* For the Department of Veterans Affairs, “Veteran-owned small business or VOSB”:

(1) Means a small business concern—

(i) Not less than 51 percent of which is owned by one or more Veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more Veterans;

(ii) The management and daily business operations of which are controlled by one or more Veterans;

(iii) The business meets Federal small business size standards for the applicable North American Industry Classification System (NAICS) code identified in the solicitation document;

(iv) The business has been verified for ownership and control pursuant to 38 CFR part 74 and is so listed in the Vendor Information Pages (VIP) database, (<https://www.vip.vetbiz.gov>); and

(v) 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 (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 VOSB set-asides and sole source contracts.

(2) “Veteran” is defined in 38 U.S.C. 101(2).

(b) *General.*

(1) Offers are solicited only from eligible veteran-owned small business concerns. Only VIP-listed veteran-owned small business concerns (VOSB) may submit offers in response to this solicitation. A VIP-listed service-disabled veteran-owned small business concern will be considered a VIP-listed veteran-owned small business concern for this purpose and must also meet the criteria identified in

paragraph (a)(1). Offers received from concerns that are not VIP-listed veteran-owned small business concerns shall not be considered.

(2) Any award resulting from this solicitation shall be made to a VIP-listed veteran-owned small business concern that meets the size standard for the applicable NAICS code.

(c) *Representation.* By submitting an offer, the prospective contractor represents that it is an eligible VOSB as defined in this clause, 38 CFR part 74, and VAAR subpart 819.70. Pursuant to 38 U.S.C. 8127(e), only VIP-listed VOSBs are considered eligible. Therefore, any reference in 13 CFR 121 and 125 to a service-disabled veteran-owned small business concern (SDVO SBC), is to be construed to apply to a VA verified and VIP-listed SDVOSB/VOSB and only such concern(s) qualify as similarly situated. The offeror must also be eligible at the time of award.

(d) *Agreement.* When awarded a contract (see FAR 2.101, Definitions), including orders under multiple-award contracts, or a subcontract, a VOSB agrees that in the performance of the contract, the VOSB shall comply with requirements in VAAR subpart 819.70 and SBA regulations on small business size and government contracting programs at 13 CFR part 121 and 125, including the nonmanufacturer and limitations on subcontracting requirements in 13 CFR 121.406 and 125.6, provided that for purposes of limitations on subcontracting, only VIP-listed VOSBs are considered eligible and/or “similarly situated” (i.e., a firm that has the same small business program status as the prime contractor). An independent contractor shall be considered a subcontractor. An otherwise eligible firm further agrees to the following:

(1) *Services.* In the case of a contract for services (except construction), it will not pay more than 50% of the amount paid by the government to it to firms that are not VIP-listed VOSBs.

(2) *Supplies or products.*

(i) In the case of a contract for supplies or products (other than from a nonmanufacturer of such supplies), it will not pay more than 50% of the amount paid by the government to it to firms that are not VIP-listed VOSBs.

(ii) In the case of a contract for supplies from a nonmanufacturer, it will supply the product of a domestic small business manufacturer or processor, unless a waiver as described in 13 CFR 121.406(b)(5) is granted.

(3) *General construction.* In the case of a contract for general construction, it will not pay more than 85% of the amount paid by the government to it to firms that are not VIP-listed VOSBs.

(4) *Special trade contractors.* In the case of a contract for special trade contractors, it will not pay more than 75% of the amount paid by the government to it to firms that are not VIP-listed VOSBs.

(5) *Subcontracting.* Any work that a VIP-listed VOSB subcontractor further subcontracts will count towards the percent of subcontract amount that cannot be exceeded. For supply or construction contracts, cost of materials is excluded and not considered to be subcontracted. For mixed contracts and additional limitations refer to 13 CFR 125.6.

(e) *Joint ventures.* A joint venture may be considered a VOSB if the joint venture is listed in VIP and complies with the requirements in 13 CFR 125.18, provided, that any reference therein to service-disabled veteran-owned small business concern (SDVO SBC), shall also apply equally to a veteran-owned small business (VOSB) and is to be construed for the VA as only a VIP-listed VOSB.

(f) *Precedence.* For any inconsistencies between the requirements of the SBA program for service-disabled veteran-owned small business concerns and the VA Veterans First Contracting Program, as defined in VAAR subpart 819.70 and this clause, the VA Veterans First Contracting Program requirements have precedence.

(End of clause)