

Date: December 23, 2020

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

Subj: Class Deviation from VA Acquisition Regulation Part 852—Solicitation Provisions and Contract Clauses (VIEWS 03209696)

To: Heads of the Contracting Activities

1. Purpose. To issue a VA Acquisition Regulation (VAAR) class deviation in accordance with Federal Acquisition Regulation (FAR) 1.404 and VAAR 801.404, Class deviations, to implement regulatory changes, as advised by the Civilian Agency Acquisition Council (CAAC) letter 2019-01, Supplement 1, issued July 2, 2020. This VAAR class deviation authorizes deviations from 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. This deviation partially supersedes previous class deviation issued July 12, 2019, to VAAR clauses 852.219-10 and 852.219-11 found in Attachment 10 of Class Deviation—Veterans First Contracting Program (VFCP 2016), dated July 25, 2016. The remaining text in both class deviations continue to be in effect.

2. VAAR Sections Impacted. VAAR 852.219-10 and 852.219-11.

3. Effective Date. Immediately.

4. Expiration Date. This deviation expires when incorporated into the VAAR or is otherwise rescinded or superseded.

5. Applicability. This class deviation applies to all VA contracting activities and is applicable to all VA contracts.

6. Exception. None.

7. Background. CAAC letter 2019-01 was issued to serve as consultation in accordance with FAR 1.404 allowing agencies to authorize a class deviation to implement regulatory changes made by the Small Business Administration (SBA) to limitations on subcontracting in its final rule published in the Federal Register at 81 FR 34243 on May 31, 2016. The final rule changed and standardized the limitations on subcontracting and the non-manufacturer rule with which small businesses must comply under Government contracts awarded pursuant to the set-aside, sole source, or Historically Underutilized Business Zone price evaluation preference authorities of the Small Business Act. As a result, VA issued Class Deviation from VA Acquisition Regulation Part 819—Small Business Programs and Part 852—Solicitation Provisions and Contract Clauses, dated July 12, 2019, to incorporate the SBA's regulatory and legislative changes and clarify the applicability of limitations on subcontracting and non-manufacturer requirements to

Class Deviation from VA Acquisition Regulation Part 852—Solicitation Provisions and Contract Clauses

contracts awarded under the VFCP. Since the issuance of CAAC letter 2019-01, FAR Case 2014-002, Set-Asides under Multiple Award Contracts was issued as a final rule and became effective on March 30, 2020. On July 2, 2020, the CAAC issued Supplement 1 supplementing and superseding guidance issued under their original consultation letter.

These issuances significantly changed how the government applies legislative requirements related to limitations on subcontracting for small business and socio-economic programs, which VA must follow.

a. Need for Deviation. As a result of the aforementioned regulatory changes, the clauses related to VA service-disabled veteran-owned small business (SDVOSB)/veteran-owned small business (VOSB) awards under VAAR part 819 need to be updated in advance of the VAAR proposed rule and public comment. This VAAR class deviation is required as a result of the CAAC letter to update the limitations on subcontracting and the non-manufacturer rule for VA's unique VFCP in the associated VAAR clauses. Although this class deviation will align the VFCP more closely with that of the SBA, there are still major differences between the VA's SDVOSB program and the FAR-based service-disabled veteran-owned small business concern (SDVO SBC) program. For example, VA's unique VOSB program doesn't exist under the FAR. Additionally, other administrative revisions are included.

b. New Policy. This class deviation updates VAAR clauses 852.219-10 and 852.219-11 as shown in the Attachment. Revisions are also identified by a vertical line in the right margin of the attached class deviation.

8. 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 or (202) 632-5288.

Angela Billups
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Angela Billups, Ph.D.

Attachment—Class Deviation—VAAR Part 852—Solicitation Provisions and Contract Clauses (NOV 2020) (DEVIATION)

CLASS DEVIATION

VAAR PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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 (NOV 2020) (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 802.201](#), 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 listed in [VA's Vendor Information Pages \(VIP\) database](#); 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, 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 unless otherwise stated in this clause.

(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).

(3) The term “small business concern” has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 632).

(4) The term “small business concern owned and controlled by Veterans with service-connected disabilities” has the meaning given the term “small business concern owned and controlled by service-disabled Veterans” under section 3(q)(2) of the Small Business Act (15 U.S.C. 632(q)(2)), except that for a VA contract the firm must be listed in the VIP database (see paragraph (a)(1)(iv) above).

(b) General.

(1) Offers are solicited only from VIP-listed SDVOSBs. Offers received from entities that are not VIP-listed SDVOSBs at the time of offer shall not be considered.

(2) Any award resulting from this solicitation shall be made to a VIP-listed SDVOSB who is eligible at the time of submission of offer(s) and at the time of award.

(3) The requirements in this clause apply to any contract, order or subcontract where the firm receives a benefit or preference from its designation as an SDVOSB, including set-asides, sole source awards, and evaluation preferences.

(c) *Representation.* Pursuant to 38 U.S.C. 8127(e), only VIP-listed SDVOSBs are considered eligible to receive award of a resulting contract. 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](#).

(d) *Agreement.* When awarded a contract action, including orders under multiple-award contracts, 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 part 125, including the non-manufacturer rule and limitations on subcontracting requirements in 13 CFR 121.406(b) and 125.6. Unless otherwise stated in this clause, a requirement in 13 CFR part 121 and 125 that applies to an SDVO SBC, is to be construed to also apply to a VIP-listed SDVOSB. For the purpose of limitations on subcontracting, only VIP-listed SDVOSBs (including independent contractors) 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 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 non-manufacturer 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 non-manufacturer, 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) has been 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 construction contractors.* In the case of a contract for special trade contractors, no more than 75% of the amount paid by the government to the prime may be paid to firms that are not VIP-listed SDVOSBs.

(5) *Subcontracting.* An SDVOSB must meet the NAICS size standard assigned by the prime contractor and be listed in VIP to count as similarly situated. Any work that a first tier VIP-listed SDVOSB subcontractor further subcontracts will count towards the percent of subcontract amount that cannot be exceeded. For contracts referenced in (d)(2), (3), and (4) the cost of materials is excluded and are not considered to be subcontracted. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract. Other direct costs may be excluded to the extent they are not the principal purpose of the acquisition and small businesses do not provide them. For additional information and more specific requirements on the limitations on subcontracting, refer to 13 CFR 125.6.

(e) *Required limitations on subcontracting compliance measurement period.* An SDVOSB shall comply with the limitations on subcontracting as follows:

[Contracting Officer check as appropriate.]

_____By the end of the base term of the contract or order, and then by the end of each subsequent option period; or

_____By the end of the performance period for each order issued under the contract.

(f) *Joint ventures.* A joint venture may be considered eligible as an SDVOSB if the joint venture is listed in VIP and complies with the requirements in 13 CFR 125.18(b), provided that any requirement therein that applies to an SDVO SBC is to be construed to apply to 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.

(g) *Precedence*. Any inconsistencies between the requirements of the SBA Program for SDVO SBCs, and the VA Veterans First Contracting Program, as defined in [VAAR subpart 819.70](#) and this clause, the VA Veterans First Contracting Program takes precedence.

(h) *Misrepresentation*. Pursuant to 38 USC 8127(g), any business concern, including all its principals, that is determined by VA to have willfully and intentionally misrepresented a company's SDVOSB status is subject to debarment from contracting with the Department for a period of not less than five years (see VAAR 809.406, Debarment).

(End of clause)

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

As prescribed in subpart [819.7009](#), insert the following clause:

VA NOTICE OF TOTAL VETERAN-OWNED SMALL BUSINESS SET-ASIDE (NOV 2020) (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 listed in [VA's Vendor Information Pages \(VIP\) database](#); 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, provided that any requirement therein that applies 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, unless otherwise stated in this clause.

(vi) Unless otherwise stated, the term VOSB includes VIP-listed service-disabled veteran-owned small businesses (SDVOSB).

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

(3) The term "small business concern" has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 632).

(4) The term "small business concern owned and controlled by Veterans" has the meaning given that term under section 3(q)(3) of the Small Business Act (15 U.S.C. 632(q)(3)), except that for a VA contract the firm must be listed in the VIP database (see paragraph (a)(1)(iv) above).

(b) General.

(1) Offers are solicited only from VIP-listed VOSBs, including VIP-listed SDVOSBs. Offers received from entities that are not VIP-listed at the time of offer shall not be considered.

(2) Any award resulting from this solicitation shall be made only to a VIP-listed VOSB who is eligible at the time of submission of offer(s) and at time of award.

(3) The requirements in this clause apply to any contract, order or subcontract where the firm receives a benefit or preference from its designation as a VOSB, including set-asides, sole source awards, and evaluation preferences.

(c) *Representation.* Pursuant to 38 U.S.C. 8127(e), only VIP-listed VOSBs are considered eligible to receive award of a resulting contract. 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](#).

(d) *Agreement.* When awarded a contract action, including orders under multiple-award contracts, 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 part 125, including the non-manufacturer rule and limitations on subcontracting requirements in 13 CFR 121.406 (b) and 125.6. Unless otherwise stated in this clause, any requirement in 13 CFR part 121 and part 125 that applies to an SDVO SBC, is to be construed to also apply to a VIP-listed VOSB. For the purpose of the limitations on subcontracting, only a VIP-listed VOSB, (including independent contractors) is considered eligible and/or "similarly situated" (*i.e.*, a firm that has the same small business program status as the prime contractor). 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 non-manufacturer 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 non-manufacturer, 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) has been 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 construction contractors.* In the case of a contract for special trade contractors, no more than 75% of the amount paid by the government to the prime may be paid to firms that are not VIP-listed VOSBs.

(5) *Subcontracting.* A VOSB must meet the NAICS size standard assigned by the prime contractor and be listed in VIP to count as similarly situated. Any work that a first-tier VIP-listed VOSB subcontractor further subcontracts will count towards the percent of subcontract amount that cannot be exceeded. For contracts referenced in (d)(2), (3), and (4), the cost of materials is excluded and not considered to be subcontracted. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract. For information and more specific requirements, refer to 13 CFR 125.6.

(e) *Required limitations on subcontracting compliance measurement period.* A VOSB shall comply with the limitations on subcontracting as follows:

[Contracting Officer check as appropriate.]

_____ By the end of the base term of the contract or order, and then by the end of each subsequent option period; or

_____ By the end of the performance period for each order issued under the contract.

(f) *Joint ventures.* A joint venture may be considered eligible as a VOSB if the joint venture is listed in VIP and complies with the requirements in 13 CFR 125.18(b), provided that any requirement therein that applies to an SDVO SBC is to be construed to also apply to a VIP-listed VOSB. 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.

(g) *Precedence.* Any inconsistencies between the requirements of the SBA Program for SDVO SBCs and the VA Veterans First Contracting Program, as defined in

[VAAR subpart 819.70](#) and this clause, the VA Veterans First Contracting Program takes precedence.

(h) *Misrepresentation*. Pursuant to 38 USC 8127(g), any business concern, including all its principals, that is determined by VA to have willfully and intentionally misrepresented a company's VOSB status is subject to debarment from contracting with the Department for a period of not less than five years (see VAAR 809.406, Debarment).

(End of clause)