

Date: July 20, 2021

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

Subj: Class Deviation from VA Acquisition Regulation Part 808, Required Sources of Supplies and Services (VIEWS 05411327)

To: Heads of the Contracting Activities

1. Purpose. To issue a class deviation in accordance with Federal Acquisition Regulation (FAR) 1.404, Class Deviations, and VA Acquisition Regulation (VAAR) 801.404, Class Deviations. The class deviation revises VA's original implementation of legislative amendments to VA's Veteran's First Contracting Program (VFCP) by adding language to provide for an exception to small business contracting requirements applicable to the VA's procurement of certain goods and services covered under the AbilityOne program. This class deviation supersedes Class Deviation from VAAR 808.002, Priorities for Use of Mandatory Government Sources, dated August 14, 2020.

2. VAAR Part Impacted. VAAR Part 808, to include section 808.002, and Subpart 808.6.

3. Effective Date. Immediately.

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 This deviation expires when incorporated into the VAAR or superseded.

5. Applicability. This class deviation applies to all VA contracts (see definition of contract at FAR 2.101). Additionally, this deviation applies to contracts conducted by VA or on behalf of VA, using interagency acquisitions in accordance with 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. Exception. None.

7. Background. On August 08, 2020, Public Law 116-155, the Department of Veterans Affairs Contracting Preference Consistency Act of 2020 (H.R. 4290), amending 38 U.S.C. 8127, was enacted and effective as of the same date. In summary, the new legislation requires a contracting officer of the Department to procure covered products and services on the Procurement List maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled (the Committee), through the AbilityOne Program, as a priority mandatory Government source. This requirement shall not apply in the case of a covered product or service for which a contract was awarded to a Service-Disabled Veteran-Owned Small Business (SDVOSB)/Veteran-Owned Small Business (VOSB) under the authority of 38 U.S.C. 8127(d)(1) using restricted competition after December 22, 2006

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and in effect on the day before the enactment of the Act, August 7, 2020. In such case, these covered products and services shall continue under VA's unique SDVOSB/VOSB set-aside program using restricted competition as provided in VAAR 819.7005 and 819.7006. When these SDVOSB/VOSB contracts are terminated or expire, the Head of the Contracting Activity or designee, is required to make a determination that the VA Rule of Two cannot be met before the requirement can be procured under the AbilityOne program. The legislation provides a definition of covered products and services and an exception, which the VA implements in this class deviation pending publication of an interim final rule (RIN 2900-AR07).

a. Need for Deviation. To revise VA's original implementation of Public Law 116-155, by deviating from VAAR part 808 to add language at VAAR 808.002 implementing the aforementioned legislative amendments. Additionally, to add language at VAAR subpart 808.6 and VAAR 808.603, since the previous language expires on July 1, 2021 in the Temporary Rule text at VAAR 808.002, VAAR subpart 808.6 and VAAR 808.603.

b. New Policy. This class deviation adds policy at VAAR 808.002 regarding the priority for use of supplies and services that are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled and the required purchase of covered products and services from the AbilityOne Program as a mandatory Government source, with certain exceptions. It also deviates to add language at VAAR 808.603, Purchase priorities, which was updated in the previously issued Temporary Rule, which states that contracting officers may purchase supplies and services produced or provided by FPI from eligible SDVOSBs and VOSBs, in accordance with procedures set forth in subpart 819.70, without seeking a waiver from FPI.

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.

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Class Deviation to VAAR Part 808

CLASS DEVIATION

VETERANS AFFAIRS ACQUISITION REGULATION (VAAR)

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 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, through the AbilityOne Program (FAR subpart 8.7). Supplies that are on the Procurement List but which do not meet the definition of a covered product are only considered a mandatory source in accordance with FAR 8.002 if an award is not made to a VIP-listed and verified SDVOSB/VOSB after following the procedures set forth in subpart 819.70.

(A) *Definition.* As used in this paragraph—

Covered product means a product that—

(1) Is included on the Procurement List as authorized under 41 U.S.C. 8503(a) (see FAR 8.703) and was included on the Procurement List on or before December 22, 2006;

(2) Meets the following criteria—

(i) Is a replacement for a product under this paragraph;

(ii) Is essentially the same and meeting the same requirement as the product being replaced; and

(iii) The contracting officer determines the product meets the quality standards and delivery schedule requirements of VA.

(B) *Policy.* Except as provided in paragraph (a)(1)(iv)(C) and (D), contracting officers shall procure covered products that are on the Procurement List through the AbilityOne Program as set forth in FAR subpart 8.7. Contracting officers shall not procure products that are on the Procurement List but which do not meet the definition of a covered product using the procedures set forth in FAR subpart 8.7 unless award cannot be made to a VIP-listed and verified SDVOSB/VOSB pursuant to the procedures set forth in subpart 819.70.

(C) *Exception for certain contracts awarded in accordance with the Veterans First Contracting Program in subpart 819.70.* If a contract for a covered product awarded under the authority of 38 U.S.C. 8127(d)(1) to a VIP-listed SDVOSB or VOSB was in effect as of August 7, 2020, the requirement shall continue as an SDVOSB/VOSB set-aside in accordance with 819.7005 and 819.7006.

(D) *Termination or expiration of excepted contracts.* When a contract previously awarded as set forth in paragraph (a)(1)(iv)(C) is terminated or expires, contracting officers shall procure such covered product through the AbilityOne Program as a priority mandatory Government source (see (a)(1)(iv)(B)), provided the head of the contracting activity or designee determines there is no reasonable expectation that—

(1) Two or more SDVOSBs/VOSBs will submit offers; and

(2) Award can be made at a fair and reasonable price that offers best value to the United States.

(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, through the AbilityOne Program (FAR subpart 8.7). Services that are on the Procurement List but which do not meet the definition of a covered service are only considered a mandatory source in accordance with FAR 8.002 if an award is not made to a VIP-listed and verified SDVOSB/VOSB after following the procedures set forth in subpart 819.70.

(i) *Definition.* As used in this paragraph—

Covered service means a service that—

(A) Is included on the Procurement List as authorized under 41 U.S.C. 8503(a) (see FAR 8.703) and was included on the Procurement List on or before December 22, 2006; or

(B) Meets the following criteria—

(1) Is a replacement for a service under this paragraph;

(2) Is essentially the same and meeting the same requirement as the service being replaced; and

(3) The contracting officer determines the service meets the quality standards and delivery schedule requirements of VA.

(ii) *Policy.* Except as provided in paragraph (a)(2)(iii) and (iv), contracting officers shall procure covered services that are on the Procurement List through the AbilityOne Program as set forth in FAR subpart 8.7. Contracting officers shall not procure services that are on the Procurement List but which do not meet the definition of a covered service using the procedures set forth in FAR subpart 8.7 unless award cannot be made to a VIP-listed and verified SDVOSB/VOSB pursuant to the procedures set forth in subpart 819.70.

(iii) *Exception for certain contracts awarded in accordance with the Veterans First Contracting Program in subpart 819.70.* If a contract for a covered service awarded under the authority of 38 U.S.C. 8127(d)(1) to a VIP-listed SDVOSB or VOSB was in effect as of August 7, 2020, the requirement shall continue as an SDVOSB/VOSB set-aside in accordance with 819.7005 and 819.7006.

(iv) *Termination or expiration of certain excepted contracts.* When a contract previously awarded as set forth in paragraph (a)(2)(iii) is terminated or expires, contracting officers shall procure such covered service through the AbilityOne Program as a priority mandatory Government source (see (a)(2)(ii)), provided the head of the contracting activity or designee determines there is no reasonable expectation that—

(A) Two or more SDVOSBs/VOSBs will submit offers; and

(B) Award can be made at a fair and reasonable price that offers best value to the United States.

(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, 13.106-1 and part 806 for justification requirements).

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Subpart 808.6—Acquisition from Federal Prison Industries, Inc.

808.603 Purchase priorities.

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