

Date: September 27, 2018

From: Deputy Senior Procurement Executive

Subj: VA PROCUREMENT POLICY MEMORANDUM (2016-05)(Revised AUG 2018) -
Implementation of the Veterans First Contracting Program as a Result of the U.S.
Supreme Court Decision (VIEWS 00096807)

To: Heads of the Contracting Activities

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

a. Revise and reissue PPM 2016-05 – Implementation of the Veterans First Contracting Program as a Result of the U.S. Supreme Court Decision, dated July 25, 2016. (Note: Changes to the original PPM other than minor administrative formatting or grammatical corrections are denoted by a solid bar line in the right-hand margin.)

b. Provide revised Department of Veterans Affairs (VA) policy, procedures, guidance, and instruction regarding the Veterans First Contracting Program as required by 38 U.S.C. §§ 8127 – 8128 and implemented under VA Acquisition Regulation (VAAR) subpart 819.70, as a result of the June 16, 2016 decision of the U.S. Supreme Court in *Kingdomware Technologies, Inc. v. United States (Kingdomware)*.

b. Provide revised internal policy and procedures to address any required changes related to other affected VAAR parts and internal business processes as a result of the U.S. Supreme Court's decision.

c. Identify the various parts of the VAAR that require a Class Deviation to fully implement the required changes as a result of the U.S. Supreme Court decision.

d. Rescind the following, effective the date of the publication of this PPM:

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 competition among 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 Rule of Two to all contracting determinations.

(2) The 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). The Court held that 38 U.S.C. § 8127(d) unambiguously requires the Department to use the Rule of Two before contracting under competitive procedures. 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, to implement changes that are now required in VA's acquisition policies and procedures and to ensure consistent execution of contracts to comply with the U.S. Supreme Court's decision in *Kingdomware* and applicable law. Attachment 1 to this PPM includes a Class Deviation to the VAAR and internal policy and procedures.

c. The PPM is being revised to provide clarity and alignment with VAAR 819.7007 and 819.7008 (DEVIATION) (JUL 2016) regarding sole source awards to verified service-disabled veteran-owned small businesses or veteran-owned small businesses.

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. This immediate "Effective Date" applies to all VA procurement actions, including those pending award.

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

6. Affected VAAR parts. Attachment 1 contains a summary of the VAAR Class Deviation and affected parts that now encompass VA's implementation of the requirements contained in 38 U.S.C. § 8127 and § 8128.

The VAAR parts 802, 804, 806, 808, 810, 812, 813, 817, 819, 852, and 873 are affected by the Supreme Court decision. There are VAAR Class Deviations to the affected VAAR parts issued to effectuate compliance with 38 U.S.C. § 8127 and § 8128.

7. 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.

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.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 (BPA) 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 business whose SDVOSB status derives from ownership and control by a surviving spouse shall also be considered a VOSB.

8. **Action Required:** To implement changes required as a result of the U.S. Supreme Court decision in *Kingdomware*, concerning the Veterans First Contracting Program and proper implementation of 38 U.S.C. § 8127 and § 8128. Effective immediately, 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 (HCA) shall review all HCA level or lower policy, procedures, or guidance to ensure compliance with this PPM and the Class Deviation with the same subject.

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 and the Decision Tree tool (see Attachment 2). The Decision Tree tool and this PPM seek 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 input 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 requirements set forth in VAAR 819.7005 and 819.7006, as well as the requirements set forth in 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 will assist in supporting his or her decision whether there is a reasonable expectation of receiving two or more offers to justify a set-aside decision. 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 819.203-70, Priority for SDVOSB/VOSB Contracting Preferences, 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 and capable 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 memorandum 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 provide an offer. In performing market research the contracting officer must use the VIP database as the initial source 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 needs 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).

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 and that the VIP database has been reviewed. This is irrespective of whether an initial decision was made to set aside the acquisition for SDVOSBs or VOSBs.

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 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 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, as indicated in the OSDBU 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 OSDBU Small Business Procurement Review Program (PRP) Policy memorandum provides the most recent information on which requirements must have an OSDBU review and requires review of acquisitions not set-aside for SDVOSBs or VOSBs. For submission instructions for the eCMS, alternative submission guidelines, and OSDBU's VA Form 2268 Decision Matrix see <http://vaww.va.gov/osdbu/ast/2268.asp>.

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

1) **Solicitations set aside for SDVOSBs/VOSBs.** Contracting officers shall continue with requirements that have been set aside for SDVOSBs or VOSBs that have been verified in the Vendor Information Pages (VIP) database.

2) **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 VA verify SDVOSBs or VOSBs 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 verified SDVOSBs or VOSBs 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 non-responsive and ineligible for award.

3) **Limitations on Subcontracting (Non-manufacturer 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 FAR 19.102(f) 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 clauses—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.

Regarding the procurement of supplies via a set aside, see FAR 19.102(f)(5) “For a specific solicitation, a contracting officer may request a waiver of that part of the nonmanufacturer rule which requires that the actual manufacturer or processor be a small business concern if the contracting officer determines that no known domestic small business manufacturers or processors can reasonably be expected to offer a product meeting the requirements of the solicitation.” When market research indicates the market has a sufficient number of SDVOSB or VOSB distributors, the contracting officer is responsible for preparing a request for waiver of the non-manufacturer rule, if needed, and the expected value exceeds the simplified acquisition threshold.

4) Requirements currently in the pre-solicitation phase: The VA Rule of Two applies:

a) If the acquisition strategy is to set-aside for SDVOSBs or VOSBs, ensure the solicitation includes the requirement for offerors to be listed as verified in VIP. Evaluation criteria should clearly indicate that unverified SDVOSBs or VOSBs will be considered non-responsive to the requirements of the solicitation. Offers from unverified SDVOSBs or VOSBs are considered deficient and will not be evaluated. Supporting documentation must be maintained in the contract file in eCMS.

b) If the original acquisition strategy was not to set aside the acquisition for SDVOSBs or VOSBs, a review of the original market research and VA Form 2268 shall be accomplished to confirm whether or not the VA Rule of Two was appropriately considered and whether offers are likely to be received from two or more capable and verified SDVOSBs or VOSBs at a fair and reasonable price that offers the best value to the United States. If the review finds that there are two or more capable and verified SDVOSBs or VOSBs and award can be made at a fair and reasonable price, the action shall be set aside for SDVOSBs or VOSBs in accordance with the contracting order of priority set forth in VAAR 819.7004.

5) Requirements currently in the solicitation/evaluation phase:

a) **For requirements not set aside for verified SDVOSBs/VOSBs under the Veterans First Contracting Program:**

(i) A review of the original market research and VA Form 2268 shall be accomplished to confirm whether or not the VA Rule of Two was appropriately considered and whether offers are likely to be received from two or more capable and verified SDVOSBs or VOSBs at a fair and reasonable price that offers the best value to the United States.

(ii) If the review finds the VA Rule of Two can be satisfied, an amendment shall be issued that cancels the solicitation.

(iii) Change the set-aside to SDVOSBs/VOSBs, in accordance with the contracting order of priority set forth in VAAR 819.7004 and resolicit.

(iv) However, if this impacts the required need date and results in a situation where unusual and compelling urgency exists to continue with the original acquisition strategy, a justification and approval is required in accordance with FAR 6.303 setting forth the circumstances to be approved in accordance with agency and HCA procedures.

(v) Supporting documentation must be maintained in the contract file in eCMS.

b) For requirements set aside for SDVOSBs/VOSBs and offers have been received and are currently being evaluated:

(i) Contracting officers shall review the market research conducted and documented to ensure compliance with §8127's "VA Rule of Two" requirement and that the VIP database has been reviewed.

(ii) Ensure the solicitation included the requirement for offerors to be verified in VIP and evaluation criteria that clearly indicates that unverified SDVOSBs or VOSBs will be considered non-responsive to the requirements of the solicitation. Offers from unverified SDVOSBs or VOSBs are considered deficient and will not be evaluated. If required, issue an amendment to ensure the appropriate language is contained in the solicitation.

(iii) Supporting documentation must be maintained in the contract file in eCMS.

6) For all new competitive requirements:

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 in accordance with the contracting order of priority as set forth in VAAR 819.7004, submit the VA Form 2268 for review and approval in accordance with the latest OSDDBU Small Business Procurement Review Program Policy memorandum.

e) If two or more verified 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 VOSBs are awardees.

f) Ensure the solicitation includes the requirement for offerors to be listed as verified in VIP. Evaluation criteria should clearly indicate that unverified SDVOSBs or VOSBs will be considered non-responsive to the requirements of the solicitation. Offers from unverified SDVOSBs or VOSBs are considered deficient and will not be evaluated. Supporting documentation must be maintained in the contract file in eCMS.

7) 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(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. These include supplies and services listed on the Procurement List issued by the Committee for Purchase

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from People Who Are Blind or Severely Disabled. Follow the procedures at FAR 8.705 for procuring listed items from the designated central non-profit agencies or the affiliated AbilityOne non-profits. To add new requirements to the Procurement List contracting officers shall comply with the requirements of VAAR 808.002, Priorities for use of mandatory Government Sources, Class Deviation, February 9, 2018.

Contracting officers should refer to VAAR 808.603 for information on acquisitions from Federal Prison Industries (FPI).

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/

D. Edward Keller, Jr.

Attachments

1. Class Deviation—VFCP 2016, dated July 25, 2016
2. Decision Tree Tool