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SUBMITTED THROUGH WWW.REGULATIONS.GOV

Director, Regulation Policy and Management (00REG)
U.S. Department of Veterans Affairs
810 Vermont Avenue NW
Room 1063B
Washington, DC 20420

Re: Comments Submitted in Response to RIN 2900-AQ21—VA Acquisition
Regulation: Competition Requirements

To Whom It May Concern:

We are writing to submit comments in response to the U.S. Department of Veterans Affairs' ("VA" or "Agency") proposed rule issued on February 1, 2019, RIN 2900-AQ21—VA Acquisition Regulation: Competition Requirements. According to the notice of this rulemaking in the Federal Register, these comments are timely submitted by the April 2, 2019 deadline. See 84 Fed. Reg. 1041-01 (Feb. 1, 2019).

Our firm represents small businesses operating across the government contracting spectrum, and many of these companies are service-disabled veteran-owned small businesses ("SDVOSBs") verified to participate in VA's "Veterans First Contracting Program." In representing these firms and working with VA, we have received numerous comments from our clients and have become familiar with how VA and the VA Acquisition Regulation ("VAAR") implement the "Vets First" mandate under the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the "Vets Act"). We have also closely followed the U.S. Supreme Court's ruling in Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 195 L. Ed. 2d 334 (2016), VA's subsequent steps to adhere to the Supreme Court's ruling, and how the Federal Circuit and Court of Federal Claims have interpreted the Supreme Court's ruling in recent bid protest decisions.

Against that backdrop, we want to start by commending VA for its thoughtful development of this proposed rule and the Agency's overarching goal of revising and streamlining the VAAR. We believe SDVOSBs and veteran-owned small businesses ("VOSBs"), as well as VA contracting officers, will benefit from the clarity this rulemaking provides and the further strengthening of the "Vets First" requirements in the VAAR when conducting procurements. However, as discussed below, the proposed rule requires revisions to ensure that VA contracting officers appropriately and routinely utilize the "Vets First" contracting authorities and requirements for SDVOSBs and VOSBs.

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❖ **The Amendments to VAAR 806.501 Will Be Beneficial, But Must Be Implemented Correctly and Should Include Other Amendments**

VA is proposing to amend VAAR 806.501 to designate the Deputy Senior Procurement Executive “as the VA Advocate for Competition” and to provide “[a] complete list of VA procuring activity Advocates for Competition [which] can be found at <https://www.va.gov/oal/business/pps/policy.asp>.” These amendments are helpful, as they will provide clarity for small businesses regarding which advocates they can contact to discuss procurement-related issues. However, the hyperlink included in the amended regulation does not provide a readily available list of Advocates for Competition as the amended regulation asserts. Should VA implement this amended regulation, the website must be updated to provide the list of Advocates for Competition referenced in the amended regulation.

Additionally, VAAR 806.501 could be further improved by including a requirement to identify the cognizant SBA Procurement Center Representative, the VA Ombudsman, and the VA Advocate for Competition in each solicitation above the simplified acquisition threshold. In our experiences, small businesses often are unsure of who to contact with small business-related concerns regarding a solicitation. Knowing exactly who to contact at VA and SBA will save time and allow small businesses access to resolve concerns with a solicitation, and may save VA from dealing with unnecessary questions from offerors and protests against the solicitation terms.

❖ **We Commend VA’s Proposal to Add VAAR 806.270 but Suggest Some Minor Revisions**

VA is proposing to add VAAR 806.270, which accounts for Kingdomware and implements the set-aside requirements mandated by the Vets Act. We applaud VA’s proposed inclusion of this provision and strongly agree with this supplement to FAR Part 6. VAAR 806.270 will help to ensure that all solicitations, whether they contemplate award of a schedule contract or a task order, will be properly set aside for SDVOSBs and VOSBs in accordance with the Vets Act. Our further comments regarding proposed VAAR 806.270 are as follows.

1. VAAR 806.270 Must Be Modified to Exclude References to Class Deviation Provisions

VA should remove the reference to “the VA Rule of Two (see 802.101)” from the final version of VAAR 806.270 because VAAR 802.101 currently contains no definition for “the VA Rule of Two.” The definition of “VA Rule of Two” was not added to VAAR 802.101 via the required notice and public comment rulemaking process. Rather, VA added this definition through a class deviation. See U.S. Dept. of Veterans Affairs, Class Deviation—Implementation of the Veterans First Contracting Program as a Result of the U.S. Supreme Court Decision (Class Deviation—Veterans First Contracting Program) (July 25, 2016).

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While we have no issue with this definition in-and-of-itself, we believe VA should not reference it in VAAR 806.270 because it was not properly added to the VAAR. This is an example of how VA has improperly used “class deviations” to the VAAR to change its acquisition rules without following the proper administrative procedures, including public notice and comments, as required by law. See 5 U.S.C. § 553(b), (c). These “class deviations” are not embodied in the VAAR available from www.eCFR.gov or Westlaw; VA simply makes the changes effective through class deviation memoranda on its website. We feel strongly that VA is not permitted to make such changes to its regulations without following the applicable administrative procedures for new rulemakings.

As such, the following language should be stricken from the proposed rule: “and the VA Rule of Two (see 802.101).” Moreover, this language is superfluous because the proposed regulation already references the necessary Vets Act statutory provisions, 38 U.S.C. §§ 8127–8128, and the applicable implementing regulations found in VAAR 819.70.

2. The VAAR Must Fully Implement the Vets Act Priority for SDVOSBs and VOSBs

Because VAAR 806.270 implements the set-aside requirements in the Vets Act, this rulemaking provides an opportunity to reiterate other ways in which the VAAR should ensure the full implementation of the Vets Act priority for SDVOSBs and VOSBs. The Vets Act mandates that there is a preference for VA to award contracts in the following order of priority: (1) contracts awarded to SDVOSBs; (2) contracts awarded to VOSBs that are not SDVOSBs; (3) contracts awarded pursuant to Section 8(a) or Section 31 of the Small Business Act; (4) contracts awarded pursuant to any other small business contracting preference. See 38 U.S.C. § 8127(i). The hierarchy of these preferences is also embodied in VAAR 819.7004, which indicates the contracting officer shall consider, in the following order of priority, contracting preferences that ensure contracts will be awarded first to SDVOSBs, second to VOSBs, and then to other types of small businesses.

Additionally, in procuring goods and services pursuant to a contracting preference, Congress mandated that VA “shall give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference.” See 38 U.S.C. § 8128(a). The law does not state that these priorities only apply to certain types of contracts. Rather, the law makes clear the priorities apply broadly to all VA contracts—which would include VOSB set-asides (concerning the first priority for SDVOSBs) and other types of small business set-asides and unrestricted procurements (concerning both the first and second priorities for SDVOSBs and VOSBs, respectively). Nothing in the statute indicates this priority applies based on the evaluation methodology used in awarding a contract. Rather, the statute simply and broadly requires the priority for SDVOSBs and VOSBs over all other businesses in the award of all VA contracts. See 38 U.S.C. § 8127(i).

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Beyond the contracting priority to be used when setting a contract or order aside, VA also must give an evaluation preference to SDVOSBs and VOSBs, with greater evaluation preference for SDVOSBs, then VOSBs, then all other small businesses consistent with the Vets Act. The regulatory history of VAAR 815.304-70, titled “Evaluation Factor Commitments,” states that the “VA provides evaluation preferences for SDVOSBs and VOSBs in the proposed rule...The rule requires inclusion of SDVOSB and VOSB status as an evaluation factor when competitively negotiating the award of contracts or task/delivery orders under FSS when price is not the sole basis for award.” See 74 Fed. Reg. 64619-01, 62624 (2009). The U.S. Court of Federal Claims has indicated that the required evaluation preference should be met by awarding “full credit” to SDVOSBs and “partial credit” to VOSBs during the evaluation. See Standard Communications Inc. v. United States, 101 Fed. Cl. 723, 732–33 (2011).

For these reasons, it is critical that when a contracting officer follows the authorities in proposed VAAR 806.270, the contracting officer is aware and understands the ways that statutory priority for SDVOSBs, then VOSBs, must be implemented in all VA acquisitions. For example, as we have previously commented, even though the contracting officer may conduct a VOSB set aside under the authorities cited in VAAR 806.270, the contracting officer must still insert VAAR 852.215-70, SDVOSB and VOSB Evaluation Factors, and give first priority to SDVOSBs.¹

Furthermore, as we have previously commented, there are additional places in the VAAR where the priority for SDVOSBs, then VOSBs, before other small businesses and large businesses should be made clear to ensure the “Vets First” mandate is fully implemented. We have been involved with multiple VA procurements that failed to provide any priority for SDVOSBs, let alone first priority, and no priority for VOSBs, let alone second priority. As one example, in the cases we and our clients have encountered, VA has asserted that the Federal Acquisition Regulation (“FAR”) provisions for Lowest Price Technically Acceptable (“LPTA”) procurements do not permit tradeoffs, so they cannot apply the priority for SDVOSBs and VOSBs under VAAR 852.215-70. This is incorrect. VAAR 852.215-70 does not require the priority to be implemented in the form of tradeoffs. In fact, VAAR 852.215-70(b) simply indicates that SDVOSBs will be given “full credit,” while VOSBs will be given “partial credit,” without specifying the nature of the credit. In an LPTA procurement, the full and partial credit for SDVOSBs and VOSBs should be implemented as a price evaluation preference, with SDVOSBs receiving a greater price preference (i.e., full credit) than VOSBs (partial credit). Further clarifying the statutory priority for SDVOSBs and VOSBs should lessen the confusion and instances of VA procurements without first priority for SDVOSBs, second priority for VOSBs, followed by all other small businesses. In sum, the Vets Act does not state that the

¹ For a more detailed response to the rules proposed in 83 Fed. Reg. 45374 (Sept. 7, 2018), please see our comments submitted on November 6, 2018 in response to RIN 2900-AQ20 and on January 24, 2019 in response to RIN 2900-AQ24.

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priority for SDVOSBs first and VOSBs second over other businesses depends on the evaluation methodology.

Based on the above, in our recent comments we applauded VA for proposing a new version of VAAR 852.215-70(a), which removes language from the current rule that indicates the evaluation of offerors based on SDVOSB status, VOSB status, or their proposed use of SDVOSBs and VOSBs “depend[s] on the evaluation factors included in the solicitation.” We strongly agreed with the removal of this language because, as noted, the evaluation factors and preferences for SDVOSBs and VOSBs apply regardless of the type of evaluation scheme and factors used in a solicitation.

However, we would like to reiterate that VA should go further to explain how contracting officers can give full credit for SDVOSBs and partial credit for VOSBs depending on the type of evaluation factors utilized. This applies in each procurement conducted under the authorities cited in VAAR 806.270, and VA should make this clear in the preamble to the final rule. In particular, it would be beneficial to avoid the confusion we have seen from many contracting officers on how to apply the credit in price-oriented procurements. To eliminate this confusion, we suggested a new provision should be added to VAAR 852.215-70 as follows:

When applying the full and partial credit for SDVOSBs and VOSBs under subsection (b) in a procurement where price is the only factor or that uses a lowest price technically acceptable source selection process as described in FAR 15.101-2, the contracting officer must deem the price offered by a verified SDVOSB to be 10% lower than its proposed price for evaluation purposes. The contracting officer must deem the price offered by a verified VOSB to be 5% lower than its proposed price for evaluation purposes.

❖ **We Applaud VA’s Emphasis on its Sole Source Authority in Proposed VAAR 806.302-570, But It Requires Some Modifications**

We strongly agree with VA’s proposed addition of VAAR 806.302-570, which provides for sole source procedures in accordance with the Vets Act. The proposed regulation adheres to the statutory language in 38 U.S.C. § 8127(b)–(c), and, therefore, implements only what the Vets Act requires for the issuance of sole source contracts to SDVOSBs and VOSBs. In this way, VAAR 806.302-570 will properly instruct VA contracting officers on the only steps necessary to issue sole source contracts to SDVOSBs and VOSBs pursuant to VA’s unique sole source authority under the Vets Act.

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However, there are several aspects of the proposed rule at VAAR 806.302-570 that should be revised to ensure the sole source authority is correctly understood and implemented. Our comments in this regard are as follows:

1. VA's Reference in the Preamble to Additional Internal Requirements is Problematic

In the preamble to the proposed rule, VA states that VAAR 806.302-570(a) “provides that . . . internal agency review and approval thresholds set forth in VA internal procedures apply.” 84 Fed. Reg. 1042–43. This statement is incorrect—nothing in the proposed text of VAAR 806.302-570(a) states that VA internal procedures apply. Rather, the proposed rule states that a sole source contract can be awarded in accordance with cited provisions in the VAAR, as well as the justification and approval requirements in cited sections of the FAR.

We are very concerned about the suggestion that this proposed rule requires contracting officers to consider unspecified “internal procedures” to award a sole source contract. As we have previously commented for other VA rulemakings, VA has improperly added restrictions to its sole source authority through a “class deviation,” which made changes to VAAR 819.7007 and 819.7008, but VA did not make these changes through the notice and comment rulemaking process. See U.S. Dept. of Veterans Affairs, VA Acquisition Update No. 2008-03 (2017). This class deviation effectively requires contracting officers to conduct a rule of two analysis before issuing a sole source contract to an SDVOSB or VOSB. However, the Vets Act clearly contains no such requirement; the law permits VA to issue sole source contracts to SDVOSBs and VOSBs regardless of whether the rule of two is satisfied. This makes the sole source authority under the Vets Act a unique and powerful tool for VA contracting officers to benefit SDVOSBs and VOSBs. VA should not issue internal guidance that makes it more difficult than Congress intended for contracting officers to utilize the sole source tool.

The proposed rule itself at VAAR 806.302-570 contains the appropriate language from the Vets Act concerning the sole source authority. Proposed VAAR 806.302-570(b), which concerns sole source awards below the simplified acquisition threshold, includes the appropriate SDVOSB and VOSB priorities and correctly allows “using procedures other than full and open competition.” See 38 U.S.C. § 8127(b), (i). Similarly, proposed VAAR 806.302-570(c) includes the same three requirements for contracting officers that appear in 38 U.S.C. § 8127(c) when determining whether to make a sole source award above the simplified acquisition threshold to an SDVOSB or VOSB: (1) the concern is responsible; (2) the price of the contract will be above the simplified acquisition threshold but below \$5,000,000; and (3) the “contract award can be made at a fair and reasonable price that offers best value to the United States.” See 38 U.S.C. § 8127(c). These are the only steps that Congress required for VA to issue sole source contracts to SDVOSBs and VOSBs, and, therefore, they are the only steps that should be in the VAAR implementing the Vets Act.

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Because the text of the proposed VAAR 806.302-570 contains the appropriate statutory language and does not add additional, unnecessary rule of two analysis before a VA contracting officer issues a sole source contract, our comment here does not suggest any changes to the proposed regulatory text. Instead, our comment here is directed to the preamble's reference to internal VA procedures that are not incorporated in the regulatory text. When VA issues the final rule, it should explain in the preamble that the only requirements for a VA contracting officer to issue a sole source contract under the Vets Act are as specified in the text of VAAR 806.302-570, and there are no unspecified agency procedures or class deviations that would restrict or water down this unique and important tool.

2. VA Should Provide Contracting Officers Guidance Regarding What Constitutes a Fair and Reasonable Price

In VAAR 806.302-570 and other aspects of the proposed rule, VA references the determination that an SDVOSB or VOSB provides a “fair and reasonable price that offers best value.” This language is found in 38 U.S.C. § 8127 and has been the subject of several bid protests. Based on governing case law, the statutory language can be satisfied in a variety of ways, including market research and by the existence of price competition, and it does not require a full-blown best value analysis such as would occur in the review of proposals for contract award. *See, e.g., AeroSage LLC*, B-414314, B-414314.2 (May 5, 2017) (noting that adequate price competition between two firms would constitute a finding that award could be made at a fair and reasonable price); *HealthRev, LLC; DLH Solutions, Inc.*, B-416595 (Oct. 25, 2018) (“Here, the VA’s market research led it to conclude that there were at least five viable SDVOSB concerns that could potentially meet the agency’s requirements, and that there would be adequate competition, such that the agency could make award at a fair and reasonable price.”); *Crosstown Courier Serv., Inc.*, B-406336 (Apr. 23, 2012) (“As noted, however, the agency received an expression of interest from only one concern. Accordingly, the agency had no reasonable expectation of receiving proposals or quotes from at least two FSS SDVOSB (or VOSB) vendors, nor was there a basis for the agency to conclude from its market research that it would be able to make award at a fair and reasonable price.”); *American Med. Response*, B-406274 (Mar. 16, 2012) (“On the basis of this market research, the contracting officer concluded that there was a reasonable expectation that the agency would receive proposals from at least two SDVOSBs, and that prices submitted likely would be competitive.”).

We do not suggest any changes to the text of the proposed regulations because the references to “fair and reasonable price that offers best value” comes directly from the Vets Act. However, we do think it would be beneficial for contracting officers and contractors for VA to clarify, in the preamble to the final rule, what is demonstrated in the case law discussed above. Namely, that the contracting officer has flexibility to select among several options to determine

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if he or she will receive fair and reasonable pricing from an SDVOSB or VOSB, such as through the existence of price competition or if the SDVOSB or VOSB has an FSS contract (the prices for which have already been determined to be fair and reasonable). Furthermore, VA should explain that a determination of fair and reasonable pricing equates to best value at the market research stage; there is no requirement (nor would it be feasible) for contracting officers, in conducting market research, to conduct a separate best value determination after determining the SDVOSB or VOSB's pricing is fair and reasonable.

3. VA Should Revise VAAR 806.302-570(a) to Remove Unnecessary Steps for the Justification and Approval

VAAR 806.302-570(a) states that, in issuing sole source contracts to SDVOSBs and VOSBs under the Vets Act, such contracts “shall be supported by justification and approval requirements of FAR 6.302-5(c)(2)(ii), 6.303 and 6.304.” While we understand that justification and approval documentation is needed to confirm the Vets Act sole source authority has been properly utilized, we point out that there are aspects of the cited FAR provisions that are not applicable to the unique sole source authority granted to VA under the Vets Act. Therefore, we recommend that VA revise VAAR 806.302-570(a) to state that the sole source contract shall be supported “by the applicable justification and approval requirements of FAR 6.302-5(c)(2)(ii), 6.303, and 6.304.”

Specifically, several aspects of a justification and approval under FAR 6.303-2 do not apply to a Vets Act sole source contract. For example, FAR 6.303-2(b)(5) requires “[a] demonstration that the proposed contractor’s unique qualifications or the nature of the acquisition requires use of the authority cited.” Beyond being a responsible SDVOSB or VOSB for the procurement, the Vets Act does not require VA contracting officers to establish that the proposed SDVOSB or VOSB contractors have unique capabilities that require use of VA sole source authority. Moreover, VA contracting officers certainly do not need to show that the nature of the acquisition requires use of the Vets Act sole source provisions.

As another example, FAR 6.303-2(b)(6) requires “[a] description of efforts made to ensure that offers are solicited from as many potential sources as is practicable” The Vets Act simply does not include such a requirement. To the contrary, the Vets Act explicitly permits VA contracting officers to issue sole source contracts to SDVOSBs and VOSBs regardless of whether the rule of two may be satisfied.

Similarly, FAR 6.303-2(b)(11) implies that contracting agencies should be removing barriers to competition, which clearly goes against the purpose of the Vets Act’s sole source provisions. Congress wrote the Vets Act sole source authority so VA contracting officers could award sole source contracts to SDVOSBs and VOSBs without regard to competition or the rule of two.

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Proposed VAAR 806.302-570(a) also references the requirements found in FAR 6.304. FAR 6.304 provides that the contracting officer must receive the approval of the advocate for competition by the procuring activity designated pursuant to FAR 6.501, the head of the procuring activity, or the senior procurement executive of the agency prior to making award. Thus, for VA sole source awards to SDVOSBs and VOSBs, contracting officers must walk through many more bureaucratic steps than those provided in the Vets Act for sole source authority. The additional regulatory requirements not found in the Vets Act also take away the ability of VA contracting officers to award sole source SDVOSB and VOSB contracts by requiring approval at multiple levels above the contracting officer—unnecessarily delaying (if not preventing) SDVOSB/VOSB sole source procurements authorized by Congress. This adds additional sole source approval requirements not based in the language of the Vets Act, which explicitly reference contracting officers. See 38 U.S.C. § 8127(b) (“a contracting officer. . . may use other than competitive procedures.”); (c) (“a contracting officer . . . may award a contract to a small business concern owned and controlled by veterans using procedures other than competitive procedures . . .”). For these reasons, VA should remove the citation to FAR 6.304 from VAAR 806.302-570(a) when the rule is finalized.

❖ **Proposed VAAR 806.302-571 Should Make Clear That the Cited Authorities Do Not Trump the Vets Act**

Proposed VAAR 806.302-571 references several authorities that permit sole source contracts. For example, VAAR 806.302-571(b)(1), regarding prosthetic appliances and services, largely tracks the language found in 38 U.S.C. § 8123, which states that “[t]he Secretary may procure prosthetic appliances . . . by purchase, manufacture, contract, or in such other manner as the Secretary may determine to be proper, without regard to any other provision of law.” 38 U.S.C. § 8123 (emphasis added). Proposed VAAR 806.302-571(b)(1) also adds that VA can conduct the procurement of “prosthetic appliances and necessary services . . . without regard to any other provision of law as set forth in VA directives governing prosthetic appliances, sensory aids and services supporting the same.” 84 Fed. Reg. 1045 (emphasis added). We are concerned that the language “without regard to any other provision of law” in VAAR 806.302-571(b)(1) and in the other proposed sections of this rule may create confusion as to whether this sole source authority trumps the Vets Act requirements for VA to give priority to SDVOSBs and VOSBs in all VA contracts.

The sole source authorities cited in VAAR 806.302-571 do not trump the VA’s obligations under the Vets Act. For example, 38 U.S.C. § 8123 provides, permissively, that VA may procure prosthetic appliances . . . without regard to any other provision of law.” By contrast, the Vets Act includes broader language that mandates VA give priority to SDVOSBs and VOSBs. Indeed, the Vets Act provides in unequivocal terms that “[i]n procuring goods and services pursuant to a contracting preference under this title or any other provision of law, the

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Secretary shall give priority to a small business concern owned and controlled by veterans” 38 U.S.C. § 8128(a) (emphases added). Part of this broad mandate includes use of VA’s unique sole source authority. And the Vets Act provides for prioritizing SDVOSBs and VOSBs over all other businesses, regardless of the contract type. See 38 U.S.C. § 8127(i). This applies with equal force to the procurement of prosthetic appliances and services.

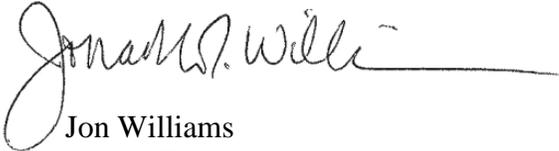
VA has issued directives indicating that it does not view 38 U.S.C. § 8123 as providing unfettered sole source authority. This guidance is found in VA Veterans Health Administration Directive 1081 (“Directive 1081”). Directive 1081 significantly limits the use of Section 8123 for sole source procurements and favors the use of mandatory sources (such as the mandatory FSS Group 65 contracts) and competitive procedures. For example, Directive 1081 states that network contracting officers are responsible for “[u]sing mandatory and priority sources provided in FAR 8.002 and VAAR 808.002 and/or full and open competition procurement procedures when the prosthetic appliance or sensory aid prescribed is generally available and interchangeable.” See Directive 1081 at 2. Similarly, the Directive states that VISN prosthetic representatives are responsible for identifying local and regional contracts “to limit the need for using 38 U.S.C. 8123 as the cited authority to procure items with other than full and open competition.” Id. at 4. These provisions in the Directive demonstrate that VA is supposed to sparingly use the sole source authority under Section 8123, and it must submit an appropriate justification before doing so.

In sum, VA should clarify that the other statutory authorities that permit sole source contracts, such as 38 U.S.C. § 8123, referenced in proposed VAAR 806.302-571(b) do not trump the mandatory, overriding language in the Vets Act that requires VA to give priority to SDVOSBs and VOSBs in all contracts.

We appreciate your attention to this matter and trust that you will carefully consider these comments. Please do not hesitate to contact us if you have any questions.

Very truly yours,

PILIEROMAZZA PLLC



Jon Williams
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