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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-AQ20—VA Acquisition Regulation: Contracting by Negotiation; Service Contracting

To Whom It May Concern:

We are writing to submit comments in response to the U.S. Department of Veterans Affairs' ("VA") proposed rule issued on September 7, 2018, RIN 2900-AQ20—VA Acquisition Regulation: Contracting by Negotiation; Service Contracting. According to the notice of this rulemaking in the Federal Register, these comments are timely submitted by November 6, 2018. See 83 Fed. Reg. 45374 (Sept. 7, 2018).

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 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, including the need to ensure that VA contracting officers appropriately and routinely utilize evaluation preferences for SDVOSBs and VOSBs in VA procurements.

Our further comments on the proposed rule are as follows:

- **We Agree With VA's Noted Exceptions to Its Proposed Policy to Promote Competition Where Only One Offer Is Received, But the Rule Needs Clarification to Serve Its Intended Purpose**

VA is proposing to add VAAR 815.370-2, which would state that when competitive procedures are used, but only one offer is received, the contracting officer should consider revising and re-soliciting the requirement. We agree with the proposal to include certain exceptions to this, as found in VAAR 815-370-4. Of note, VA has included an exception for set-asides conducted under various small business programs, including set-asides under VAAR 819. See 83 Fed. Reg. 45379–80.

We strongly agree that it is necessary for VA to exempt contracting officers from re-soliciting proposals when the contracting officer only receives one proposal for set-asides under the Vets First program. This exception is necessary because prior to VA setting aside procurements for SDVOSBs or VOSBs, the contracting officer conducts market research and takes other steps to maximize competition among SDVOSBs or VOSBs. VA contracting officers should not have to consider whether to re-solicit the work if they receive only one acceptable offer for an SDVOSB or VOSB set-aside contract.

The proposed exception for set-asides aligns with the existing procedures in VAAR 819.7005 and VAAR 819.7006, which provide that if only one acceptable offer at a fair and reasonable price is received on a SDVOSB or VOSB set-aside procurement, the contracting officer should award the contract to the eligible SDVOSB or VOSB. The proposed exception is also consistent with SDVOSB and VOSB set-aside procedures in the Federal Acquisition Regulation ("FAR"), which provide that "[i]f the contracting officer receives only one acceptable offer from a service-disabled veteran-owned small business concern in response to a set-aside, the contracting officer should make an award to that concern." FAR 19.1405(c).

Given the importance of the exception for set-asides under VAAR 819 and other small business programs, we are concerned that the proposed language in VAAR 815.370-4(b) creates confusion and may effectively undercut the set-aside exception. VAAR 815.370-4(b) provides that "[t]he applicability of an exception in paragraph (a) of this section does not eliminate the need for the contracting officer to seek maximum practicable competition …." 83 Fed. Reg. 45380. However, if the set-aside exception applies, this means the contracting officer has already taken the steps necessary to promote competition amongst small businesses for the listed types of small business set-asides, including set-asides under VAAR 819. Therefore, it is unclear what additional steps the contracting officer could, or should, take to seek maximum competition after the contracting officer has already set aside the competition for small businesses, but it received only one offer.

We believe VAAR 815.370-4(b) could be misread to suggest that, even when the exception applies, the contracting officer must still consider maximizing competition when only one offer has been received—which in many cases would mean considering whether to re-solicit the requirement. This is obviously not the intent of the rule, which is intended to not require contracting officers to consider re-soliciting the requirement when only one offer is received for a set-aside contract. And, paragraph (b) does not align with VAAR 819.7005, VAAR 819.7006, and FAR 19.1405(c), which provide that the contracting officer should make award to the sole offeror in a set-aside.

We do not think there is anything more the contracting officer could or should do to maximize competition after a contract has already been set aside for competition amongst the different types of small businesses. We also question whether paragraph (b) is necessary given other rules already promote the need to seek maximum practicable competition. At a minimum, the language in VAAR 815.370-4(b) should be revised as follows:

> (b) ***Other than the exception for set-asides in subsection (a)(3),*** ~~***T***~~***the*** applicability of an exception in paragraph (a) of this section does not eliminate the need for the contracting officer to seek maximum practicable competition and to ensure that the price is fair and reasonable.

Furthermore, while VAAR 815.370-2 applies to competitive procurements, it is important to note and be clear that the policy of promoting competition does not affect VA's ability to use its unique sole source authority that Congress provided in the Vets Act, as well as the limited circumstances that contracting officers must satisfy to use this authority. When Congress created the sole source authority in the Vets Act for procurements above the simplified acquisition threshold, it only required the satisfaction of the steps found in VA's proposed rule at VAAR 813.106-70(c), issued earlier this year. Going forward, VA should make clear that its contracting officers need not do more than what is set forth in VAAR 813.106-70(c) to make sole source awards to SDVOSBs and VOSBs above the simplified acquisition threshold.

- **The VAAR Must Fully Implement 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).

The U.S. Government Accountability Office has confirmed that 38 U.S.C. § 8127(i) "sets out an order of priority for the contracting preferences it establishes, providing that the first priority for contracts awarded pursuant to 38 U.S.C. § 8127(d) shall be given to SDVOSB concerns, followed by VOSBs." Phoenix Environmental Design, Inc., B-407104 (2012); see also Powerhouse Design Architects & Engineers, Ltd., B-403175, et al. (2010). 38 U.S.C. § 8127(d) requires a set-aside for SDVOSBs or VOSBs if the VA Rule of Two is met. The U.S. Court of Federal Claims also has stated that under the Vets First Program, "VA considers SDVOSB and VOSB entities as first and second priority for procurement awards." AmBuild Co. v. United States, 119 Fed. Cl. 10, 19 (2014).

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 the above reasons, it is critical that the SDVOSB and VOSB preferences and evaluation factors are correctly incorporated into VA contracts. In this regard, VA should revise the proposed VAAR 815.304-71(a), which currently says that contracting officers shall insert VAAR 852.215-70, SDVOSB and VOSB Evaluation Factors, "in competitively negotiated solicitations that are not set aside for SDVOSBs or VOSBs." 83 Fed. Reg. at 45379. This should be revised to exclude only SDVOSB set-asides, so it would read "… in competitively negotiated solicitations that are not set aside for SDVOSBs." Because of the statutory priority to SDVOSBs first, followed by VOSBs, contracting officers should include VAAR 852.215-70 in

VOSB set-asides because it is possible an SDVOSB could pursue a VOSB set-aside and would be entitled to full evaluation credit under the law.

VAAR 852.215-71(a) requires the offeror to use an SDVOSB or VOSB subcontractor named in its proposal if it receives award (or use a substitute SDVOSB or VOSB). Therefore, it does not seem problematic for VA to move the language in the current version of VAAR 815.304-70(b) to the VA Acquisition Manual. However, it is critical for SDVOSB and VOSB subcontractors to have mechanisms in place that will hold prime contractors accountable for not utilizing SDVOSB and VOSB subcontractors as intended. Given that opportunities for SDVOSBs and VOSBs are increasingly moving to the subcontract level, it is critical to ensure that primes are contractually obligated to utilize their SDVOSB and VOSB subcontractors and would face breach of contract liability if they do not.

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

Based on the above, we applaud 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 agree with the removal of this language because, as noted, the evaluation factors and preferences for SDVSOBs and VOSBs apply regardless of the type of evaluation factors that are used.

However, we think 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. In particular, it would be beneficial to avoid the confusion we have seen from many

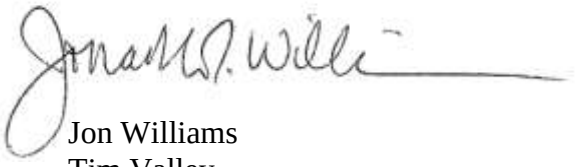
contracting officers on how to apply the credit in price-oriented procurements. To eliminate this confusion, we suggested a new provision could be added to VAAR 852.215-70 as follows:

> ***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 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



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