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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-AQ24—VA Acquisition Regulation: Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace; Protection of Privacy and Freedom of Information; Other Socioeconomic Programs; and Contract Modifications

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 November 29, 2018, RIN 2900-AQ24—VA Acquisition Regulation: Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace; Protection of Privacy and Freedom of Information; Other Socioeconomic Programs; and Contract Modifications.

According to the notice of this rulemaking in the Federal Register, these comments are timely submitted prior to the January 28, 2019 deadline. See 83 Fed. Reg. 61365 (Nov. 29, 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 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 local area set-aside procurements. However, the proposed rule requires revisions to ensure that VA contracting officers appropriately and routinely utilize evaluation preferences for SDVOSBs and VOSBs in local area set-asides and, relatedly, in other procurements.

Our further comments on the proposed rule are as follows:

❖ **VAAR Part 826 Will Be Beneficial, But It Needs Further Clarification**

VA is proposing to add VAAR 826.202-1(c),<sup>1</sup> which would require contracting officers to “determine whether a local area set-aside should be further restricted to verified [SDVOSBs] or [VOSBs] pursuant to subpart 819.70.” We commend VA for inclusion of this provision and strongly agree that it is necessary for VA contracting officers to make this determination, which is mandated by the Vets Act.<sup>2</sup> See 38 U.S.C. § 8127(d).

However, given the importance of evaluation preferences mandated by the Vets Act, we are concerned that the proposed language in VAAR 826.202-2 creates confusion regarding the contracting officer’s obligations to evaluate and give preference to SDVOSBs and VOSBs in procurements not set aside for SDVOSBs or VOSBs. Proposed VAAR 826.202-2 provides that “[p]ursuant to 38 U.S.C. 8128 and if market research does not support an SDVOSB or VOSB set-aside, the contracting officer shall consider including evaluation factors in accordance with 815.304 and the evaluation criteria clause prescribed at 815.304-71(a), 852.215-70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors.” 83 Fed. Reg. at 61370 (emphasis added). In contrast, 38 U.S.C. § 8128 does not mandate that VA merely “consider” giving preference to SDVOSBs and VOSBs. Rather, the law provides that “[i]n procuring goods and services pursuant to a contracting preference under this title or any other provision of law, the Secretary shall give priority to a small business concern owned and controlled by veterans . . . .” 38 U.S.C. § 8128(a) (emphasis added). Thus, the phrase “shall consider including” creates unnecessary confusion and, more importantly, fails to comply with the clear mandate of the Vets Act.

Indeed, the mandatory requirement to provide evaluation preferences to SDVOSBs and VOSBs is clear in each VAAR provision cited in VAAR 826.202-2. See 48 C.F.R. § 815.304(a)

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<sup>1</sup> VA has only proposed a subpart (c) and it is unclear whether VA will also propose sections (a) and (b) when promulgating 48 C.F.R. § 826.202-1.

<sup>2</sup> In the Supplementary Information, Part 826—Other Socioeconomic Programs portion of the proposed rule, VA provides that “the Secretary may establish goals for awarding to Service-Disabled Veteran-Small Businesses and Veteran-Owned Small-Businesses . . . .” and cites to 38 U.S.C. §§ 8127-8128 for the authority to add Part 826. 83 Fed. Reg. at 61367 (emphasis added). This is commendable and we agree with the addition of Part 826; however, the use of the word “may” is misleading because under these statutory provisions the Secretary must establish goals for awarding government contracts to SDVOSBs and VOSBs. See 38 U.S.C. § 8127(a).

(“In an effort to assist SDVOSBs and VOSBs, contracting officers shall include evaluation factors providing additional consideration to such offerors in competitively negotiated solicitations that are not set aside for SDVOSBs or VOSBs.”) (emphasis added); 48 C.F.R. § 815.304-71(a) (“The contracting officer shall insert the provision at 852.215-70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors, in competitively negotiated solicitations that are not set aside for SDVOSBs or VOSBs.”) (emphasis added); 48 C.F.R. § 852.215-70 (“As prescribed in 815.304-71(a), insert the following clause: Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors . . .”).

Thus, in summary, VA should not use the phrase “shall consider” because this suggests that VA contracting officers have discretion in whether to provide evaluation preferences for SDVOSBs and VOSBs, which they do not. Moreover, it is unclear how that discretion would be exercised if it existed (which it does not). To bring VAAR 826.202-2 into compliance with the Vets Act and harmonize it with other parts of the VAAR, the provision should be revised as follows:

Pursuant to 38 U.S.C. 8128 and if market research does not support an SDVOSB or VOSB set-aside, the contracting officer shall **consider include** evaluation factors in accordance with 815.304 and the evaluation criteria clause prescribed at 815.304-71(a), 852.215-70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors.

This minor revision will ensure that Part 826 complies with the Vets Act and that SDVOSBs and VOSBs receive their statutorily mandated preferences in procurements not set aside for SDVOSBs or VOSBs.

❖ **The VAAR Must Fully Implement the Vets Act Priority for SDVOSBs and VOSBs**

In light of the above, and as we have previously commented, it is important to emphasize that 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 these reasons, it is critical that the SDVOSB and VOSB preferences and evaluation factors are correctly incorporated into VA contracts, including for local area set-asides conducted under proposed Part 826 as noted above. In this regard, VA should revise the proposed VAAR 815.304-71(a), which currently states 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.<sup>3</sup> 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 award contracts to SDVOSBs first, followed by VOSBs, contracting officers should include

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<sup>3</sup> 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.

VAAR 852.215-70 in VOSB set-asides because an SDVOSB could pursue a VOSB set-aside and would be entitled to full evaluation credit under the law.

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 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 factors that are used.

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. 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*



Comments to RIN 2900-AQ24

January 24, 2019

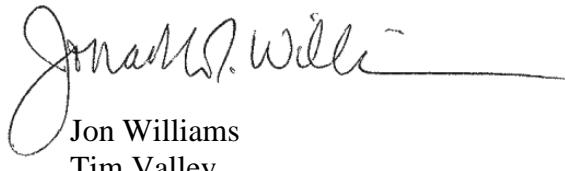
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***SDVOSB to be 10% lower than its proposed price for evaluation purposes. The contracting officer must deem the price offered by a verified VOSB to be 5% lower than its proposed price for evaluation purposes.***

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



A handwritten signature in black ink that reads "Jon Williams". Below the signature, the name "Jon Williams" is printed in a standard black font, followed by "Tim Valley" on the next line.