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United States Supreme Court decision concerning the Service-Disabled Veteran-Owned Small Business (SDVOSB) and Veteran-Owned Small Business (VOSB) contracting program at the Department of Veterans Affairs (VA) (known as the Veterans First Contracting Program)

Purpose: This Acquisition Flash provides Department of Veterans Affairs (VA) guidance regarding the Veterans First Contracting Program under VAAR subpart 819.70.

Effective Date: June 22, 2016

Expiration Date: In effect until incorporated into the Veterans Affairs Acquisition Regulation (VAAR) or Veterans Affairs Acquisition Manual (VAAM) or otherwise rescinded.

Background: On June 16, 2016, the U.S. Supreme Court reversed a lower court decision on the Veteran-Owned Small Business (VOSB) contracting program at the VA. Generally, in *Kingdomware Technologies, Inc. v. United States*, the Court ruled that consistent with Public Law 109-461 (38 U.S.C. 8127), VA must set aside procurements for Veteran-Owned Small Businesses (SDVOSBs or VOSBs) when a contracting officer has a reasonable expectation, based on market research, that two or more eligible firms are likely to submit competitive offers to meet the procurement requirements at a fair and reasonable price. This is known as the “Rule of Two.” The Supreme Court’s major holdings were:

- “...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).”
- “We also hold that [38 U.S.C.] §8127(d) applies to orders placed under the [Federal Supply Schedules] FSS.”

The Department is developing procedures for consistent execution of the Supreme Court’s decision. VA will implement the Supreme Court’s ruling in every context where the law applies. VA seeks to ensure the Department can effectively procure goods and services for Veterans in a timely manner while being good stewards of taxpayer dollars and meeting legal requirements.

Interim guidance concerning the impact from the Supreme Court ruling is provided below. Additional policy and guidance will be provided via a Procurement Policy Memorandum and Class Deviation to be issued at a later date.

Action Required:

1. **General:**

- a. **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 Department of Veterans Affairs, Office of Small and Disadvantaged Business Utilization Vendor Information Pages (VIP) database at <https://www.vip.vetbiz.gov/>.

b. **Verification of GSA FSS SDVOSBs/VOSBs.** The GSA FSS program does not require SDVOSBs or VOSBs to be verified in VIP; however, 38 U.S.C. 8127(e) does. Therefore, contracting officers shall include a requirement in all solicitations that for evaluation purposes, only VA verified SDVOSBs or VOSBs in the VIP database at the time of contract award will be considered for award and non-VIP verified firms will be considered non-responsive and ineligible for award.

c. **Limitation on Subcontracting.** Contracting officers are reminded that any SDVOSB or VOSB set-aside is subject to the Limitations on Subcontracting clauses—852.219-10, VA Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside or 852.219-11, VA Notice of Total Veteran-Owned Small Business Set-Aside, respectively. Any market research must take this into consideration.

d. **Conduct robust market research.** Contracting officers shall ensure market research that considers SDVOSBs/VOSBs is conducted and documented, as appropriate, in the contract file.

e. **Review market research results.** Contracting officers shall review the market research conducted and documented to ensure compliance with §8127's "Rule of Two" requirement and that the VIP has been reviewed. This is irrespective of whether an initial decision was made to set-aside the acquisition to SDVOSBs or VOSBs.

f. If market research clearly demonstrates that offers are likely to be received from two or more qualified, capable and verified SDVOSBs or VOSBs and award will be made at a fair and reasonable price, the Rule of Two applies and 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 verified in VIP before evaluating any offers or making awards on an SDVOSB or VOSB set-aside. Supporting documentation must be maintained in the contract file in the Electronic Contract Management System (eCMS).

2. **Requirements currently in the presolicitation phase:** The "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 verified in VIP. Evaluation criteria should clearly indicate that unverified SDVOSBs or VOSBs are non-responsive on a set-aside solicitation, and their offers 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 to SDVOSBs or VOSBs, a review of the original market research and VA Form 2268 shall be accomplished to confirm whether or not the "Rule of Two" was appropriately considered and whether offers are likely to be received from two or more qualified, capable and verified SDVOSBs or VOSBs at a fair and reasonable price. If the review finds that there are two or more SDVOSBs or VOSBs, the action shall be set-aside for SDVOSBs or VOSBs, in accordance with the contracting order of priority set forth in VAAR 819.7004

3. **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 "Rule of Two" was appropriately considered and whether

offers are likely to be received from two or more qualified, capable and verified SDVOSBs or VOSBs at a fair and reasonable price.

- ii. If the review finds that there are two or more SDVOSBs or VOSBs, 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 re-solicit.
- iv. However, if this impacts the required need date and results in a situation where urgent and compelling circumstances exists to continue with the original acquisition strategy, an appropriate J&A setting forth the circumstances is required 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 "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 are non-responsive on a set-aside solicitation, and their offers 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.

4. For contracts that have been awarded to other than verified SDVOSBs or VOSBs, however the notice to proceed has not been issued. Contracting officers shall coordinate with the HCA, OGC and OSDBU and be prepared to proceed with issuing the notice to proceed if issued within 30 days of this guidance.

5. For all new competitive requirements:

- a. The contracting officer will review VIP to determine if two or more verified SDVOSB/VOSBs are able to meet the procurement requirements.
- b. Appropriate market research shall be further conducted and documented to determine if they are qualified and capable of performing the requirement(s) at fair and reasonable prices and offers are likely to be received from two or more VIP verified firms in accordance with the "Rule of Two."
- c. Document results on the VA Form 2268, Small Business Procurement Review, as well as any required Acquisition Plan and Market Research Report as required by FAR part 7, 10, and VAAR part 807, 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 OSDBU Small Business Procurement Review memorandum.
- e. If two or more verified VOSBs are awardees on an existing BPA, Schedule, or existing multiple award IDIQ, the contracting officer may consider setting the procurement aside using that vehicle.

f. Ensure the solicitation includes the requirement for offerors to be verified in VIP. Evaluation criteria should clearly indicate that unverified SDVOSBs or VOSBs are non-responsive on a set-aside solicitation, and their offers will not be evaluated. Supporting documentation must be maintained in the contract file in eCMS.

Rescinded Policy: Acquisition Policy Flash 12-03, Small Business Act of 2010, Section 1331, dated December 16, 2011 is hereby rescinded.

Additional Information: Any part of internal VA guidance that is not consistent with the Supreme Court decision is hereby rescinded to the extent of the inconsistency. Additional guidance and specific changes to regulation and internal VA policy and procedures will be forthcoming. Direct questions or concerns to the Procurement Policy and Warrant Management Service via email at va.procurement.policy@va.gov or telephone at (202) 632-5288.