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DEPARTMENT OF VETERANS AFFAIRS

48 CFR Parts 802, 804, 808, 809, 810, 813, 815, 817, 819, 828, and  
852

RIN 2900-AM92

VA Acquisition Regulation: Supporting Veteran-Owned and Service-  
Disabled Veteran-Owned Small Businesses

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

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SUMMARY: This document implements portions of the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the Act) and Executive Order 13360, providing opportunities for service-disabled veteran-owned small businesses (SDVOSB) to increase their Federal contracting and subcontracting. The Act and the Executive Order authorize the Department of Veterans Affairs (VA) to establish special methods for contracting with SDVOSBs and veteran-owned small businesses (VOSB). Under this final rule, a VA contracting officer may restrict competition to contracting with SDVOSBs or VOSBs under certain conditions. Likewise, sole source contracts with SDVOSBs or VOSBs are permissible under certain conditions. This final rule implements these special acquisition methods as a change to the VA Acquisition Regulation (VAAR).

This document additionally amends SDVOSB/VOSB, Small Business Status Protests, where VA provided that VA would utilize the U.S. Small Business Administration (SBA) to consider and decide SDVOSB and VOSB status protests. This requires VA and SBA to execute an interagency agreement pursuant to the Economy Act. Negotiations of this interagency agreement have not yet been finalized. Therefore, VA has amended these regulations with an interim rule to provide that VA's Executive Director, Office of Small and Disadvantaged Business Utilization (OSDBU) shall consider and decide SDVOSB and VOSB status protests, and provides procedures there for, until such time as the interagency agreement is executed by the agencies. VA hereby solicits comments on this regulatory amendment only.

DATES: January 7, 2010. Comment date: Comments on the amendments regarding section 819.307, only, must be received on or before January

7, 2010.

FOR FURTHER INFORMATION CONTACT: Arita Tillman, Acquisition Policy Division (001AL-P1A), Office of Acquisition and Logistics, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, telephone (202) 461-6859, or e-mail [Arita.Tillman@va.gov](mailto:Arita.Tillman@va.gov).

SUPPLEMENTARY INFORMATION: On August 20, 2008, VA published in the Federal Register (73 FR 49141-49155) a proposed rule to revise the VAAR to implement portions of Public Law 109-461, the Veterans Benefits, Health Care and Information Technology Act of 2006, and Executive Order 13360, providing opportunities for SDVOSBs and VOSBs to increase their federal contracting and subcontracting. Comments were solicited concerning the proposal for 60 days, ending October 20, 2008. VA received 97 comments, many of which were groups of identical responses in form letters. Most commenters raised more than one issue. The issues raised in the comments are discussed below.

#### 1. SDVOSB and VOSB Verification

Comment: Several comments were received regarding the validity of VA's Vendor Information Pages (VIP) database registration process, expressing concern for ``pass through'' business relationships and the potential for other fraudulent actions.

Response: The regulations governing the verification of VOSB status, which are in 38 CFR Part 74, are not the subject of this rulemaking. Accordingly, we will not make any changes based upon the comments. In the past, vendors could register themselves in the VA vendor database and self certify the accuracy of the information provided. However, section 502 of Public Law 109-461 requires VA to maintain a database of SDVOSBs and VOSBs and that VA verify that status. Section 74.2 sets out the eligibility requirements for VIP verification, and 38 CFR 74.3 sets out the criteria for a VOSB. Further, this final rule under section 802.101, Definitions, prescribes that SDVOSBs

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and VOSBs must be listed as verified in the VIP database to participate in the Veterans First Contracting Program. The verification process is set out in 38 CFR 74.20 and requires VA Center for Veteran Enterprise officials to verify the accuracy of information vendors provide as part of the VetBiz VIP Verification application process. This verification process should alleviate some of the commenters' concern about ``pass through'' business relationships since the information contained in applications is subject to review and verification. Section 804.1102 of the proposed rule requires that SDVOSBs and VOSBs must be registered in the VIP database, available at <http://www.VetBiz.gov>, in addition to being registered in the Central Contractor Registration (CCR), as required by 48 CFR subpart 4.11, to be eligible to participate in VA's Veteran-owned Small Business prime contracting and subcontracting opportunities programs. To further address the validity of the VIP database registration process, to clarify the requirement of this section, and to allow VA time to adequately verify firms, this section is revised to state that prior to January 1, 2012, SDVOSBs and VOSBs

must be listed in the VIP database and registered in CCR to receive new contract awards under this program. After December 31, 2011, SDVOSBs and VOSBs must be listed as verified in the VIP database and registered in CCR to receive new awards under this program.

## 2. Clarification of Section 813.106

Comment: One commenter stated that proposed section 813.106 in the SUPPLEMENTARY INFORMATION section of the Proposed Rule is confusing. Therein, it states that: ``contracting officers may use other than competitive procedures to enter into a contract with a SDVOSB or VOSB when the amount is less than the simplified acquisition threshold not to exceed \$5 million.''

Response: Proposed section 813.106 stated that ``Contracting officers may use other than competitive procedures to enter into a contract with a SDVOSB or VOSB when the amount is less than the simplified acquisition threshold.''. However, as noted by the commenter, the SUPPLEMENTARY INFORMATION section in the proposed rule addressing section 813.106 describes the amount as ``less than the simplified acquisition threshold not to exceed \$5 million.''. First, 38 U.S.C. 8127(b) provides that VA may conduct other than competitive procurements up to the simplified acquisition threshold. Next, 38 U.S.C. 8127(c) provides that a VA contracting officer may award a contract to veteran owned small business concerns using other than competitive procedures if the anticipated award price including options will exceed the simplified acquisition threshold (as defined in the section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403) but will not exceed \$5 million.

In order to address the comment and provide clarification, proposed section 813.106 has been renumbered as section 813.106(a) and revised to state: ``Contracting officers may use other than competitive procedures to enter into a contract with a SDVOSB or VOSB when the amount exceeds the micro-purchase threshold up to \$5 million.''. This change will provide that VA contracting officers can award any procurement from the micro-purchase, which is currently \$3,000 for supplies, up to \$5 million using other than competitive procedures to be in accordance with both sections 8127(b) and (c). Purchases under the micro-purchase threshold are still available for award to any source, large or small, to promote administrative and economic efficiency of internal VA operations. However, section 813.202 does provide that micro-purchases shall be equitably distributed among SDVOSBs and VOSBs to the maximum extent practical.

Comment: A commenter recommended that in section 813.106, the word ``may'' be changed to ``shall.''

Response: We disagree with the commenter and believe the regulation clearly implements the discretion provided in 38 U.S.C. 8127(c) in accordance with the statute. The statutory language states a contracting officer may award a contract to a small business concern owned and controlled by veterans using other than competitive procedures. We believe the determination whether or not to use other than competitive procedures under this section is a business decision that is left to the discretion of the contracting officer. Therefore, no change is being made to the rule based on this comment.

## 3. Applicability to Architect-Engineering (A/E) Services

Comment: Several commenters asked whether proposed subpart 819.70 applies to the award of sole source VOSB and SDVOSB contracts for A/E contracts.

Response: This rule does not apply to the procedures to procure A/E services. Pursuant to the Brooks Act (Pub. L. 92-582), A/E services cannot be awarded on a sole source basis. The Brooks Act requires Federal agencies to publicly announce all requirements for A/E services, and to negotiate contracts for A/E services on the basis of demonstrated competence and qualification for the type of professional services required at fair and reasonable prices. The sole source authority in 38 U.S.C. 8127 does not override the Brooks Act because under general principles of statutory interpretation the specific governs over general language. In this instance, A/E contracting statutes govern versus contracting in general. However, since the Small Business Competitiveness Demonstration Program in subpart 19.10 of the Federal Acquisition Regulation (FAR) includes A/E services as a designated industry group (DIG), VA contracting officers may use the provisions of 38 U.S.C. 8127 and this rule when procuring DIG requirements. Section 19.1007(b)(2) of the FAR, 48 CFR 19.1007(b)(2), establishes that Section 8(a), Historically Underutilized Business (HUB) Zone and SDVOSB set-asides, must be considered in DIG acquisitions. However, using the provisions of 38 U.S.C. 8127 and this rule, VA personnel may change the order of priority to consider SDVOSB and VOSB set-asides before Section 8(a) and HUB Zone set-asides when procuring A/E services under the Small Business Competitiveness Demonstration Program.

Comment: One commenter noted that section 852.219-10(c) indicates that for services (except construction), at least 50 percent of the personnel costs must be spent for employees of the particular concern or for employees of other eligible SDVOSB concerns. The commenter stated that because A/E type services are very similar to those in the construction field (e.g., specialty trade), which only require subcontractors to perform just 25 percent of the total work, A/E contractors should also be permitted to perform 25 percent (versus 50 percent) of the work.

Response: This rule follows guidance in the generally applicable, government-wide U.S. Small Business Administration (SBA) regulations and the Federal Acquisition Regulations that set out subcontracting requirement limits for government-wide set-aside programs. See 13 CFR 125.6; 48 CFR part 19. These regulations require for a services contract (except construction) that the small business concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees. In the case of a contract for supplies or products (other than procurement from a non-manufacturer in such supplies or products), the concern will perform at least 50 percent of the cost of

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manufacturing the supplies or products (not including the costs of materials). In the case of a contract for general construction, the concern will perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials). VA's rule follows the SBA model as these percentages are commonly applied

and accepted in government-wide set aside authorities. VA has no rational basis to adjust these percentages and, for administrative ease, does not want to have to enforce separate sets of subcontracting limitations for set asides with SDVOSB/VOSBs versus other socio-economic set aside programs. Further, these subcontracting limitations ensure that the services will be performed by the veteran business owner's employees. We believe the 50 percent requirement contained in this rule is appropriate and consistent with generally accepted guidance on small business programs regarding subcontracting limitations. Therefore, no change will be made.

#### 4. Definition of SDVOSB Concern and Succession of the Business

Comment: Several commenters suggested that the definition of SDVOSB be amended to add the following information: ``The management and daily operations of the business are controlled by one or more service-disabled veteran(s) or in the case of a veteran with a permanent and severe disability, the spouse or permanent caregiver of such veteran be authorized to participate in the program on his or her behalf.''

Two commenters suggested the ``SDVOSB concern'' definition be expanded to include spouses who gain ownership of a business upon the death of any service-disabled veteran or a veteran regardless of the cause or the percent of disability. The SDVOSB status would last for a period of 2 years or until the spouse re-marries or sells the interest in the business.

Several commenters felt that the current succession definition is restrictive since surviving spouses of deceased veterans may only succeed the business if the veteran had a 100 percent disability.

One commenter suggested that the surviving spouse should be able to continue the business for at least 10 years regardless of the disability rating of the veteran.

Another commenter suggested that spouses of any service-disabled veteran of any level of disability or a veteran who died for any reason should have a 2-year period to ``sunset'' the business to protect all employees from predatory takeovers and to safeguard the value of the business concern.

Other commenters suggested that any surviving children or permanent care giver of the veteran also should be afforded the opportunity to participate in this program.

Response: The criteria for treatment of the business after the death of the veteran owner are in 38 U.S.C. 8127(h). Under current law, the surviving spouse of a veteran with a service connected disability rating of 100 percent disabled or who died as a result of a service connected disability would maintain the SDVOSB status. The surviving spouse would retain this status until he or she re-marries, relinquishes an ownership interest in the small business, or for 10 years after the death of the veteran, whichever occurs first. VA cannot interpret section 8127(h) as suggested by the commenters because the plain statutory language clearly prescribes the criteria for surviving spouse succession. There is no statutory authority to include participation of a spouse who is the caregiver to a living veteran owner, permanent caregiver of a disabled veteran or surviving children in the program. Furthermore, the length of participation by a surviving spouse is prescribed in section 8127(h). The commenter's suggestion to include a 2-year participation period for the spouse of a service-

disabled veteran regardless of the disability rating goes beyond the authority provided in the current law. The only succession of the business authorized for the program by Congress in section 8127(h) is to the surviving spouse of a veteran who had a service connected disability rating of 100 percent or who died as a result of a service connected disability. Congress has not otherwise authorized other categories of persons to maintain SDVOSB status for business succession purposes. Given that any change to the current definition would require revised statutory authority, no change may be made through this rulemaking process. The definition provided in proposed section 802.101 for SDVOSB concerns is adequate and consistent with the criteria in 38 U.S.C. 8127(h).

## 5. Synopsis Requirements

Comment: One commenter stated that proposed section 819.7007, requiring synopsis of prospective sole source contracts, conflicts with VA Information Letter 049-07-08. The commenter further stated that the Small Business Administration (SBA) Section 8(a) program does not require a synopsis for sole source awards.

Response: The commenter is correct that there is a difference between the synopsis requirement in VA Information Letter 049-07-08 and as proposed in this rule. The letter states that a synopsis is not required, but this final rule states a contracting officer may award contracts to SDVOSBs or VOSBs on a sole source basis provided that ``the requirement is synopsised in accordance with the Federal Acquisition Regulations Part 5.'' The provisions contained in this rule will supersede those contained in the letter. Further, the synopsis requirement is changed in order to ensure that all activity under VA's Veterans First Contracting Program has full transparency for all concerns, including those of the American taxpayer. Therefore, a notice of intent to issue a sole source contract will be published prior to the award of sole source contracts. Note that VA's Veterans First Contracting Program, unlike SBA's Section 8(a) program, is not a business development program. The Section 8(a) program addresses small business that must be unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the United States. This socio-economic program is designed to aid fledgling small businesses controlled by such disadvantaged individuals so that they may become familiar with the federal procurement process and eventually grow in size and capability to graduate from the Section 8(a) program. VA does not consider veterans to fall into the same category as Section 8(a) individuals. While veterans' service will entitle them to priority in many contracting opportunities with VA, VA finds that the goals of the Section 8(a) program (aiding socially disadvantaged individuals) are separate and distinct from those in this proposed regulation (priority for veteran small businesses in most procurement opportunities). As stated, VA desires transparency in SDVOSB/VOSB sole source procurements as the number of awards under this authority is likely to be significantly greater than Section 8(a) awards.

In addition, section 813.106(b) has been added to the final rule to include a synopsis requirement for contracting actions estimated to exceed \$25,000, which are performed under the purview of section 813.106(a). This synopsis requirement will likewise provide for greater

transparency within the Veterans First Contracting Program with regard to non-competitive procurements under this section.

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#### 6. Priorities of SDVOSB Contractors

Comment: One commenter stated there should be a distinction made between those service-disabled veterans who were injured in combat and those veterans who sustained non-combat related injuries.

Response: The criteria for priority for contracting preferences are prescribed in 38 U.S.C. 8127(i). Under current law, VA makes no distinction between combat and non-combat disabled veterans. The only distinction authorized by Congress in section 8127 is between small business concerns owned by veterans generally and those owned by veterans with service-connected disabilities. Congress has not otherwise authorized any preference for combat veterans. Given that any change to the current categories would require revised statutory authority, no changes will be made based upon the comment.

#### 7. Change to Federal Acquisition Regulation (FAR)

Comment: One commenter questioned why this is a change to the VA Acquisition Regulations (VAAR) and not the FAR. Another commenter stated he would like to see the same wording in the FAR or a Federal Acquisition Circular.

Response: Sections 8127 and 8128 of title 38, U.S.C., contain provisions that authorize VA to create a VA-specific procurement program to provide contracting preference to SDVOSBs and VOSBs. VA is required to give priority in contracting to small businesses owned and controlled by veterans, but the program is not intended to have government-wide applicability under the FAR. Congress has not authorized a similar procurement program applicable to all federal agency contracting. Accordingly, this rulemaking is limited to VA and therefore, can only be implemented in VA's FAR supplement, the VAAR. This VA specific rule is a logical extension of VA's mission to care for and assist veterans in returning to private life. It provides VA with the new contracting flexibilities to assist veterans in doing business with VA. SDVOSBs and VOSBs will obtain valuable experience through this VA program that can be useful in obtaining contracts and subcontracts with other government agencies as well.

#### 8. Equitable Distribution of Small Business Opportunities

Comment: One commenter stated concern over the equitable distribution of procurement opportunities available to small businesses. As a small business owner, the commenter sees few opportunities for a small construction company to work with VA given the recent legislation authorizing set-aside and negotiated procurements for veterans, HUBZone contractors, woman-owned, and Section 8(a) firms. The commenter also stated VA is paying a premium for construction contracts that are awarded as small business set-asides.

Response: VA is required to adhere to a strict order of priority as prescribed in 38 U.S.C. 8127(i). Further, in accordance with both the

Federal Acquisition Regulations (FAR) and VA Acquisition Regulations, contracting officers are required to conduct a thorough cost and/or price analysis to ensure that the government is receiving a fair and reasonable price. However, because the Small Business Competitiveness Demonstration Program in FAR subpart 19.10 includes construction as a designated industry group (DIG), VA contracting officers may use the provisions of 38 U.S.C. 8127 and this rule when procuring DIG requirements. FAR 19.1007(b)(2) establishes that Section 8(a), HUBZone and SDVOSB set-asides must be considered. However, using the provisions of 38 U.S.C. 8127, as implemented in this rule, VA personnel may change the order of priority to consider SDVOSB and VOSB set-asides before Section 8(a) and HUB Zone set-asides when procuring construction contracts under the Small Business Competitiveness Demonstration Program. Due to this statutorily prescribed contracting preference for SDVOSBs and VOSBs in VA acquisitions, other small-business owners may be disadvantaged by this rule in securing contracts with VA. Nevertheless, VA is obligated to implement the public policy set forth in statute that favors SDVOSBs and VOSBs over other small business concerns.

#### 9. AbilityOne Program Procurement List Protection

Comment: A comment was received stating the AbilityOne Network is the largest source of employment for people who are blind or have severe disabilities, including service-disabled veterans. The commenter stated that not all veterans are interested in owning a business as many prefer employment support, which is available through AbilityOne. One commenter expressed concern that this rule may adversely affect future AbilityOne contracts, which may result in fewer employment opportunities for veterans. The commenter stated the set-asides do not offer protection for disabled veterans who cannot or do not want to own their own businesses.

Response: This rule will not negatively impact AbilityOne and its ability to continue to provide employment to disabled veterans. This rulemaking does not alter AbilityOne's status in the ordering preference for current or future items on the AbilityOne procurement list.

Comment: Many commenters stated that the language in the rule does not offer sufficient protection for current AbilityOne program procurement list projects. The commenters request that while VA acquisition personnel may provide VOSB and SDVOSB with priority for new requirements, there should be no ``poaching'' of current AbilityOne projects. The commenter further stated that once a project is on the procurement list, the item should remain on the list unless VA receives consent to take the item out of the AbilityOne program.

Response: We appreciate the comments; however, AbilityOne's priority status has not been changed as a result of this rule. Further, this rule does not impact items currently on the AbilityOne procurement list or items that may be added to the procurement list in the future.

#### 10. AbilityOne Opportunities for Partnership

Comment: Several commenters stated that this is an opportunity for VOSBs and SDVOSBs to partner with AbilityOne to increase VA procurement opportunities for these socioeconomic groups. Several commenters

requested that VA modify section 819.7003(c) be modified to include AbilityOne-qualified Non-Profit Agencies (NPAs) who represent people who are blind or severely disabled be eligible to participate in a joint venture under VA's Veterans First Contracting Program. Several other commenters suggested that VA may have difficulty locating veteran organizations with the needed capacity and capability to fully use the authority contained in this rule. These commenters suggested that veteran businesses working with AbilityOne NPAs as subcontractors be given a preference priority. Some commenters suggested that VA revise the purchase priorities in section 808.603 to reflect the following order: SDVOSBs, VOSBs, then SDVOSBs or VOSBs partnering with qualified subcontractors to AbilityOne NPAs.

Response: This rule adopts the SBA's Joint Venture regulations, which provide that a SDVOSB concern may enter into a joint venture agreement with one or more other small business

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concerns for the purpose of performing a service disabled veteran owned contract. See 13 CFR 125.15(b)(1)(i). A joint venture of at least one SDVOSB concern and one or more other business concerns may submit an offer as a small business for a competitive service disabled veteran owned contract procurement so long as each concern is under the size standard corresponding to the North American Industrial Classification System (NAICS) code assigned to the contract. All companies must qualify under the SBA guidelines to be considered under section 819.7003. By definition, a small business must be a for profit entity. AbilityOne NPA's are non-profit agencies, therefore, no change can be made to create a blanket joint venture relationship authority between AbilityOne NPAs and SDVOSBs or VOSBs. At present, there is no statutory authority to create an order of priority for AbilityOne contractors working as subcontractors to SDVOSBs or VOSBs.

#### 11. Request for a Specific Order of Preference

Comment: One commenter suggested revising proposed section 808.603 to specifically define the purchase priority hierarchy for use by VA contracting personnel.

Response: We disagree with the commenter and believe that this rule clearly implements the priority purchasing preference for SDVOSB and VOSB in accordance with the statute. Under section 8128(a), VA must give priority to small business concerns owned and controlled by veterans, if the business concern meets the requirements of that contracting preference. In this rule, VA will provide discretion to its contracting officers to override certain statutory priority preferences, such as Federal Prison Industries and Government Printing Office. Under section 8128, VA is implementing priority for SDVOSBs and VOSBs to the extent authorized by the law. Otherwise, if VA's proposed VAAR change does not address other priority preferences set forth in the FAR, then the FAR will govern. On this basis, VA has determined that including a specific hierarchy of priority is not required and no such change will be made to the rule based upon the comment.

#### 12. Conversion of Commercial Activities to Private Sector

Comment: One commenter stated that the proposed rule does not address converting commercial activities to the private sector. The commenter noted that the proposed rule lacks provisions that address a situation where an SDVOSB makes an unsolicited proposal to a VA facility, for example, for housekeeping services.

Response: OMB Circular No. A-76 sets the policies and procedures that federal agencies must use in identifying commercial-type activities and determining whether these activities are best provided by the private sector, by government employees, or by another agency through a fee-for-service agreement. The determination of whether services should be performed by the private sector or government employees is outside the purview of the Veterans First Contracting Program. The term "unsolicited proposal" is defined in Federal Acquisition Regulation (FAR) 2.101, as a written proposal for a new or innovative idea that is submitted to an agency on the initiative of the offeror for the purpose of obtaining a contract with the government, and is not in response to a request for proposals, Broad Agency Announcement, Small Business Innovation Research topic, Small Business Technology Transfer Research topic, Program Research and Development Announcement, or any other Government-initiated solicitation or program. VA continues to adhere to the procedures in FAR 15.6 and VA Acquisition Regulation section 815.6 as adequate procedures to address the evaluation of unsolicited proposals. The comment is outside the purview of the proposed rule and VA will make no changes to the procedures for evaluating unsolicited proposals.

### 13. Non-Manufacturers Rule

Comment: Several commenters questioned whether VA would achieve its SDVOSB goals if the non-manufacturer rule is not waived. One commenter stated most small businesses, especially SDVOSBs, are distributors and not manufacturers.

Response: VA did not propose to make any changes to the Federal Acquisition Regulation (FAR) requirements of the non-manufacturer rule. Therefore, the FAR requirements of the non-manufacturer rule will continue to apply to SDVOSB/VOSB procurements under this authority. The non-manufacturers rule provides that a contractor under a small business set-aside contract shall be a small business that does not exceed 500 employees and that provides either its own product or that of another domestic small business manufacturing or processing concern. See 13 CFR 121.406(b)(1)(i)-(iii). The underlying intent of the non-manufacturer rule is to aid small business by ensuring that the government only buy products under set asides that are actually manufactured by small businesses. Since the effective date of section 8127, VA has met its SDVOSB and VOSB goals as established by the Secretary of Veterans Affairs. Therefore, no change is being made to the rule based on this comment.

### 14. Federal Prison Industries (FPI)

Comment: One commenter stated that inclusion of the FPI in the proposed rule totally circumvents recent legislation amending FAR 8.601 and 18 U.S.C. 4121-4128.

Response: The enabling statute for the FPI is 18 U.S.C. 4121-4128. Federal Acquisition Regulation (FAR) subpart 8.6 implements the

provisions of 18 U.S.C. 4121-4128. Generally, FPI is a priority source in federal procurement for items contained on FPI's procurement list. However, FPI's status as a required source for VA acquisitions will be changed by this rule. This rule at section 808.603 states that VA contracting officers may purchase supplies and services on FPI's procurement list from eligible SDVOSBs and VOSBs without regard to the FAR and other statutory priority status rules for FPI based on the priority provided for SDVOSBs and VOSBs without regard to any other provision of law in 38 U.S.C. 8128. Therefore, we will not change the rule based on the comment.

#### 15. Limitations on Subcontracting

Comment: One commenter stated that the requirement for an SDVOSB to perform 50 percent of the labor costs should not be mandatory since SDVOSBs cannot typically support the labor force mandated by this requirement.

Response: VA is applying the percentages that are common for all government set-aside programs. The current regulation regarding the limitation on subcontracting requirements for other set-aside programs is 13 CFR 125.6. The regulation requires (except construction) that the small business concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees. In the case of a contract for supplies or products (other than procurement from a non-manufacturer in such supplies or products), the concern will perform at least 50 percent of the cost of manufacturing the supplies or products (not including the costs of materials). In the case of a contract for general construction, the concern will perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials). The Federal Acquisition Regulation (FAR) clauses, which implement these

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subcontracting limitation requirements, include FAR 52.219-4, 52.219-14, and 52.219-27. The language included in this rule is consistent with these current limitations on subcontracting requirements typical to all manner of small business set-asides. Also, requiring SDVOSBs and VOSBs to perform 50 percent of the labor costs furthers the intent of this rule, which is to promote SDVOSBs and VOSBs. Therefore, no change will be made to the rule based on this comment.

#### 16. Mentor-Prot[eacute]g[eacute] Program

Comment: One commenter stated the SDVOSB goal to perform 50 percent of the cost of the contract should be removed if VA is to achieve its SDVOSB goal.

Response: The VA Mentor-Prot[eacute]g[eacute] Program is designed to encourage mentors to provide assistance to SDVOSB and VOSB prot[eacute]g[eacute]s to enhance their capabilities to successfully perform contracts and subcontracts for VA. The program is designed to foster long term business relationships between SDVOSBs, VOSBs and prime contractors. We believe the goal to perform 50 percent of the work is consistent with other government-wide Mentor-Prot[eacute]g[eacute] Programs. The rationale for the requirement that

the SDVOSB or VOSB perform 50 percent of the cost of the contract relates to the limitation on subcontracting requirements previously discussed in response to comment 15. Therefore, no change will be made to the rule based on this comment.

Comment: One commenter stated that proposed sections 815.304 and 852.215-70 should be revised to delete participation in the VA Mentor-Prot[eacute]g[eacute] Program as an evaluation factor when competitively negotiating the award of contracts, tasks, or delivery orders. The commenter stated that finding a mentor is a difficult and time consuming task that is of little value for start-up SDVOSBs. The commenter also stated that being in a mentor-prot[eacute]g[eacute] program does not provide additional competitive advantage any more than any other teaming arrangement, joint venture, or prime/subcontractor relationship. Finally, the commenter stated that the rule would give large businesses a back door into negotiations intended for small business through their prot[eacute]g[eacute].

Response: We believe the use of participation in VA's Mentor-Prot[eacute]g[eacute] Program as an evaluation factor is consistent with the government-wide practice used in similar programs. Large business participation in the program is encouraged to assist SDVOSBs and VOSBs in successfully performing VA contracts and subcontracts and increasing their business. VA finds that the likelihood of any abuse of the program by large businesses is minimal. As addressed above, in small business set-asides conducted under this rule, the SDVOSB or VOSB must perform defined percentages of work. Therefore, for example, a large business subcontractor mentor cannot control the performance or management of a VA contract awarded under this rule. In unrestricted acquisitions where a large business mentor may be a prime contractor, VA has included evaluation criteria in solicitations to provide extra evaluation credit to the large business offeror to encourage support for VOSBs and SDVOSBs. Proposed section 815.304-70(a)(4) prescribed that VA contracting officers shall ``consider participation in VA's Mentor-Prot[eacute]g[eacute] Program as an evaluation factor when competitively negotiating the award of contracts or task orders or delivery orders.'' Because VA intended in the proposed rule that ``consider'' be mandatory, in this final rule the word ``consider'' is changed to ``use,'' which requires contracting officers to actively use a contractor's participation in the Mentor-Prot[eacute]g[eacute] Program as an evaluation factor and creates consistency with subsections (a)(2) and (a)(3) of this section. Also, the rule requires that VA ensure the large business actually utilizes the SDVOSB or VOSB that it proposes to use to ensure the integrity of the program.

#### 17. Applicability to GSA Federal Supply Schedule (FSS) Procurements

Comment: VA received a comment stating that the proposed rule was unclear whether it was intended to be applicable to task and delivery orders under the Federal Supply Schedule (FSS). The commenter indicated that although GSA has delegated to VA the authority to administer certain schedules, the delegation does not extend to policy implementation. The commenter recommended a revision stating that SDVOSB and VOSB set-asides and sole source provisions do not apply at the FSS order level.

Response: We disagree with the commenter and reject the suggestion because this rule does not apply to FSS task or delivery orders. VA

does not believe a change to the regulation is needed, and 48 CFR part 8 procedures in the FAR will continue to apply to VA FSS task/delivery orders. Further, VA will continue to follow GSA guidance regarding applicability of 48 CFR part 19 of the FAR, Small Business Programs, which states that set-asides do not apply to FAR part 8 FSS acquisitions.

Comment: Many commenters stated that the proposed rule should apply to FSS orders since VA purchases approximately 60 percent of its goods and services through the FSS. The commenters believed that to have the greatest impact, any policy designed to maximize the participation of SDVOSBs and VOSBs in VA's purchasing process should apply to purchases made pursuant to the FSS program. The commenters stated 48 CFR subpart 8.4 governs FSS contracts. Federal Acquisition Regulation (FAR) 8.404 states that 48 CFR parts 13, 14, 15, and 19 do not apply to blanket purchase agreements or orders placed against FSS contracts. The commenters stated that failure to apply the rule to orders made under FSS contracts would severely limit the rule's effectiveness.

Response: We disagree with these commenters. FSS contracts are governed by policy developed by GSA, which has determined that set-asides do not apply to FSS orders. VA has no authority to include set-aside procedures for FSS orders under this rule; however, VA provides evaluation preferences for SDVOSBs and VOSBs in the proposed rule as follows. GSA Acquisition Letter V-05-12, dated June 6, 2005, and FAR 8.405-1(c) provide guidance on evaluation factors that may be included in FSS orders when price is not the sole consideration for award. Socioeconomic status (meaning the type of small business) may be an evaluation factor for competitive delivery or task orders under the FSS. 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. We are revising the rule to add section 808.405-2, Ordering procedures for services requiring a statement of work, which provides that when developing the statement of work and any evaluation criteria in addition to price the Government shall adhere to and apply the evaluation factor commitments in section 815.304-70.

#### 18. Applicability to Interagency Agreements

Comment: One commenter stated the rule should apply to other government entities that award contracting vehicles for VA. The commenter stated acquisition personnel may circumvent this rule by having interagency agreements done outside of VA.

Response: We agree with this comment. The criteria for the applicability of this rule to interagency agreements are written in statute at 38 U.S.C. 8127(j). Under current law, any

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contract, memorandum of understanding, agreement, or other arrangement with any governmental entity to acquire goods and services, shall include in the contract, memorandum, agreement, or other arrangement a requirement that the entity will comply, to the maximum extent feasible, with the provisions of 38 U.S.C. 8127 and 8128, as implemented in the VA Acquisition Regulations, when acquiring such goods or services. We are revising the rule to add a provision in

section 817.502, which requires other governmental agencies performing purchases on behalf VA to comply with 38 U.S.C. 8127 and 8128 to the maximum extent feasible. The inclusion of this provision holds other agencies accountable to VA's order of priority for SDVOSBs and VOSBs when procuring services and supplies for VA pursuant to an interagency agreement.

#### 19. Site Visits in the Verification Process

Comment: One commenter stated that mandatory site visits should not be used to verify the SDVOSB or VOSB status of companies. Instead, the commenter believes VA should rely on the veteran's disability rating letter as confirmation of their veteran status.

Response: Verification of VOSB status is governed by 38 CFR part 74, VA Veteran Owned Small Business Verification Guidelines. In accordance with 38 CFR 74.20(b), the VA Center for Veteran Enterprise may perform a site visit at the contractor's site. Site visits are not mandatory, but may be used in determining ownership and control of a business for verification purposes. This rulemaking did not propose to alter the current verification procedures. Accordingly, no changes will be made based upon the comment.

#### 20. Government Printing Office (GPO)

Comment: One comment was received applauding the overall goals of the rule, but the commenter stated one section directly conflicts with section 501 of title 44, United States Code, which is the enabling statute for the GPO. The commenter stated that 38 U.S.C. 8128 allows VA to supersede other provisions of law concerning contracting preferences, but not mandates like the one contained in title 44. The commenter believes that VA has no authority to ignore the requirements of title 44 as to the expenditure of appropriated funds for printing through GPO. The commenter also stated that proposed section 808.803 is not VA's only means to implement 38 U.S.C. 8128.

Response: VA agrees with the commenter that there are other means by which VA can effectively implement 38 U.S.C. 8128. Therefore, VA will delete section 808.803. In the alternative, VA will negotiate a memorandum of agreement with GPO to foster greater business opportunities for and stronger outreach efforts to SDVOSBs and VOSBs, including, but not necessarily limited to, the following. First, VA shall seek to enhance its ability under GPO's Simplified Purchase Agreement (SPA) authority whereby, for publishing and information products and services up to \$10,000, upon executing a SPA agreement with GPO, VA may solicit quotations from a database of all contractors who have been certified to participate in the SPA program and what type of products that they produce. VA may select qualified SDVOSBs and VOSBs or include criteria providing a preference for such firms in these acquisitions. Based on recent information from GPO, acquisitions under \$10,000 amount to nearly 40 percent of VA's business with GPO. In addition, VA will work with GPO to enhance its outreach efforts to SDVOSBs and VOSBs by assisting GPO in modifying its internal policy directive(s) to add these socio-economic categories to the list of small businesses with whom GPO encourages contracting. Finally, VA will provide GPO with information about its Vendor Information Page at [vetbiz.gov](http://vetbiz.gov) where VA maintains a list of veteran small businesses for

research purposes. GPO will provide information regarding qualification requirements for contracting with GPO that VA may publish or link to on VA's small business website.

## 21. Past Performance Is an Evaluation Factor

Comment: One commenter recommended that any reference to past performance as an evaluation factor as indicated in section 815.304-70, not include specific past performance regarding the required services or goods for the agency issuing the solicitation. The commenter is concerned that if a contractor does not have a proven track record with the procuring agency, the contractor cannot effectively compete. The commenter suggests that if a SDVOSB or VOSB has experience with another government entity, then they should be allowed to compete. Further, the commenter expressed concern about solicitations being written in a manner to award projects to a known entity that has worked with the agency. The commenter stated this is an unfair and deceptive procurement practice.

Response: VOSBs and SDVOSBs are not precluded from using their past performance records while under contract with another agency. VA evaluates past performance in accordance with Federal Acquisition Regulation 15.305(a)(2)(ii)-(iv). VA contracting officers are required to evaluate past performance information regarding an offeror's past or current contracts with Federal, State, or local governments for efforts similar to VA's advertised requirement. Further, VA contracting officers may consider past performance information associated with predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the current acquisition. If an offeror does not have a record of relevant past performance or if there is no past performance information available, the offeror may not be evaluated favorably or unfavorably on past performance. See 48 CFR 15.305(a)(2)(iv). Based on the foregoing, we disagree with the commenter's concern that VA's consideration of past performance may prejudice veterans that lack a proven past performance record. No change will be made to the rule because we do not believe the provision unduly affects competition between contractors on the basis of past performance.

## 22. Subcontracting Goals

Comment: One commenter stated that a provision should be added to proposed part 819, which states that the subcontracting goals must be higher for SDVOSBs and VOSBs than for other small business concerns. For example, the annual goals for SDVOSB and VOSB might be 10 percent and 7.5 percent respectively, followed by Section 8(a) at 5 percent and HubZone at 3 percent. Another commenter suggested that contracting officers should ensure that any subcontracting plans include a goal that is at least commensurate with the annual SDVOSB prime contracting goal for the total value of planned subcontracts.

Response: We believe the best practice is to negotiate the subcontracting goals based on the requirements of each discrete contract. The subcontracting goals should be set based on the nature of the requirement. It may be unrealistic to set mandatory goals applicable to all types of requirements. Furthermore, the goals for all

other socioeconomic programs are set by statute and cannot be amended through this rulemaking process.

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#### 23. Eligibility for Participants in VA Mentor-Prot[eacute]g[eacute] Program

Comment: One commenter stated the rule should clarify the eligibility of mentors and prot[eacute]g[eacute]s pursuant to the VA Mentor-Prot[eacute]g[eacute] Program. It is unclear whether a participating Mentor must be a prime contractor to its prot[eacute]g[eacute]. In proposed section 819.7102, a mentor is defined as a prime contractor that elects to promote and develop SDVOSB and/or VOSB subcontractors by providing developmental assistance designed to enhance the business success of the prot[eacute]g[eacute]. As defined in section 802.101, a prot[eacute]g[eacute] is defined as a SDVOSB or VOSB, which meets federal small business size standards in its primary NAICS code and is the recipient of developmental assistance pursuant to a mentor-prot[eacute]g[eacute] agreement. These definitions indicate the mentor must be the prime contractor and the prot[eacute]g[eacute] must be the subcontractor in an eligible mentor-prot[eacute]g[eacute] relationship. However, proposed section 819.7106 stated that prot[eacute]g[eacute]s may participate in the program in pursuit of a prime contract or as a subcontractor under the mentor's prime contract with VA, but are not required to be a subcontractor to a VA prime contractor or be a VA prime contractor. The commenter states that the proposed rule should clarify that eligible mentors are not limited to act as prime contractors and eligible prot[eacute]g[eacute]s are not limited to act as subcontractors.

Response: We concur with these comments and have made changes to clarify this matter. The word ``prime'' has been deleted from the definition of mentor in sections 819.7102 and 852.219-71(b)(1). In section 819.7102, ``SDVOSB and/or VOSB subcontractors'' is revised to indicate ``SDVOSBs and/or VOSBs.'' Section 819.7106(a), Eligibility, has been revised to state that a mentor may be either a large or small business entity or either a prime contractor or subcontractor.

#### 24. Mentor-Prot[eacute]g[eacute] Agreement Approval

Comment: One commenter stated that VA's Office of Small and Disadvantaged Business Utilization (OSDBU) should have the approval authority for VA Mentor-Prot[eacute]g[eacute] Agreements. The commenter stated that OSDBU is genuinely suited to meet this initiative.

Response: We agree with this comment and note that section 819.7108 clearly indicates that VA Mentor-Prot[eacute]g[eacute] Agreements must be submitted to VA OSDBU for review and approval.

#### 25. Training and Guidance to VA Contracting Officers

Comment: Several commenters suggested that VA contracting officers receive training and specific guidance regarding implementation of VA's Veterans First Contracting Program to ensure it is implemented effectively. Some commenters wanted to ensure that contracting officers at the local level are accountable for implementing the rule. Others

voiced concern about the use of the Prime Vendor Program instead of SDVOSBs and VOSBs.

Response: VA provides extensive training to acquisition professionals, program managers/officials, and purchase card holders. In addition, VA's OSDBU enhances this training by serving as expert advisors for any questions about the process and expends significant effort to market the statutory changes to VA contracting officers as well as VA's industry partners. VA will continue to provide ongoing training to its acquisition professionals to ensure that VA's Veterans First Contracting Program is fully understood. No change to the rule is required based on this comment.

## 26. Determination of Affiliation

Comment: One commenter stated that unless specified, SBA may classify participants in a Mentor-Prot[eacute]g[eacute] Program as a joint venture. The commenter notes that SBA states on its website that it excludes its Section 8(a) program from joint ventures. The commenter stated that if the affiliation definition is not clarified, VA's Veterans First Contracting Program would be negatively impacted.

Response: We do not believe that this needs to be addressed any further in the rule. Section 819.7103 states that a prot[eacute]g[eacute] firm is not considered an affiliate of a mentor firm based solely on the fact the prot[eacute]g[eacute] firm is receiving developmental assistance from the mentor firm under the VA Mentor-Prot[eacute]g[eacute] Program. The determination of affiliation is a SBA function; therefore, no clarification will be made to the rule.

## 27. Mentor Prot[eacute]g[eacute] Relationships Subject to Joint Venture Restrictions

Comment: One commenter stated given the SBA's definition of joint venture, it could be argued that participants in the Mentor-Prot[eacute]g[eacute] Program that are classified as a joint venture, either by their own agreement or by the SBA, would fall into the joint venture restrictions such as three bids in 2 years and the 51 percent to 49 percent work and investment. The commenter stated further that it is not the intent of the Mentor-Prot[eacute]g[eacute] Program to be restricted by the joint venture guidelines.

Response: A joint venture is an association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. 38 CFR 74.1. First, section 819.7003 provides that a prot[eacute]g[eacute] firm will not be considered an affiliate of the mentor solely on the basis that the prot[eacute]g[eacute] is receiving assistance from the mentor under VA's Mentor-Prot[eacute]g[eacute] program. Further, SBA regulations on mentor-prot[eacute]g[eacute] arrangements also provide that a prot[eacute]g[eacute] firm is not an affiliate of a mentor firm solely because the prot[eacute]g[eacute] firm receives assistance from the mentor firm under other Federal Mentor-Prot[eacute]g[eacute] programs. See 13 CFR 121.103(b)(6). Affiliation is an important issue because it means that the size status of the two or more businesses included in

the joint venture arrangement are combined to determine small business size status of the vendor. Since section 819.7003 provides that mentor-prot[eacute]g[eacute] participants will not be subject to a size status determination that combines the joint ventures' size solely on the basis of the mentor-prot[eacute]g[eacute] relationship they have established, the commenter's concern is unfounded. No change will be made to the final rule based on this comment. VA has noted that on October 28, 2009, SBA published in the Federal Register a proposed rule to amend Sec. 121.103(b)(6) to limit the exclusion from affiliation to ``a Federal Mentor-Prot[eacute]g[eacute] program where an exception to affiliation is specifically authorized by statute or by SBA under procedures set forth in Sec. 121.903.'' 74 FR 55694.

#### 28. Debarment Time Limits

Comment: One commenter recommended a minimum of 2 years and a maximum of 5 years debarment for any business that willfully or deliberately misrepresents ownership and control of the business for purposes of registering in the VetBiz.gov Vendor Information Pages database or other Federal databases.

Response: Debarment time periods are inherently discretionary in nature. In accordance with guidance in Federal Acquisition Regulation 9.406, debarment shall be for a period commensurate with the seriousness of the cause(s) but generally not to exceed 3 years. VA has taken a harder stance in this proposed rule. For example, misrepresenting veteran small business

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status could result in debarment for up to a maximum of 5 years. However, we believe imposing a mandatory minimum debarment period in this rule would diminish VA's discretion because the period of debarment should be commensurate with the violation based upon findings in administrative proceedings required for debarment actions. Therefore, no change will be made to the rule based on the comment.

#### 29. Causes for Debarment

Comment: Several comments recommended adding to proposed section 809.406-2, Causes for Debarment, misrepresentation of status as an SDVOSB/VOSB, debarment of large businesses that are used as a subcontractor that actually do more than 50 percent of the labor, including supervision of the project, as well as any SDVOSB that is a party to such action.

Response: We appreciate the comments and believe that expansion of the proposed debarment actions for violating subcontracting limitations is viable. Accordingly, we will revise the rule to add that violations of the limitation on subcontracting requirements under subpart 819.70 may result in the debarment of any large business concern and SDVOSB or VOSB concern that deliberately violates the small business subcontracting clause.

#### 30. Market Research

Comment: One commenter stated that proposed section 810.001 should

be revised to require VA contracting teams to use the VIP database as their first means of performing market research, in addition to other sources of information.

Response: We believe the existing language in proposed section 810.001 satisfies the commenter's suggestion and makes clear that VA contracting teams will utilize the VIP database, as well as other sources of information. Therefore, no change will be made to the rule.

### 31. Requirement for Mentors To Submit Subcontracting Plan

Comment: One commenter was concerned that under the Mentor-Prot[eacute]g[eacute] Program, mentors would be excused from the requirement to submit subcontracting plans for its largest federal procurement opportunities with VA or other agencies, citing the VA Mentor Prot[eacute]g[eacute] Program as its reason for noncompliance.

Response: We believe that the existing language in section 819.7105 indicates that mentors must continue to file subcontracting plans. No change will be made to the rule based on the comment.

### 32. SDVOSB/VOSB Small Business Status Protests

At section 819.307 of the proposed rule, VA included a provision that VA would utilize SBA to consider and decide SDVOSB and VOSB status protests. This requires VA and SBA to execute an interagency agreement pursuant to the Economy Act, 31 U.S.C. 1535. Negotiations of this interagency agreement have not yet been finalized. Therefore, VA has amended section 819.307 with an interim rule to provide that VA's Executive Director, OSDDBU shall consider and decide SDVOSB and VOSB status protests, and provides procedures there for, until such time as the interagency agreement is executed by the agencies. VA hereby solicits comments on this regulatory amendment only. Furthermore, 819.307 is also revised to clarify that VA regulations at 38 CFR Part 74, regarding the issues of ownership and control of SDVOSB and VOSBs, shall apply to status protests for procurements under Subpart 819.70 and that, otherwise, the procedures of FAR Part 19.307 shall apply to both VOSB and SDVOSB status protests; however, VA contracting officers shall be solely responsible for ensuring SDVOSB and VOSB compliance with the requirement to be listed on the Vendor Information Pages at VetBiz.gov in accordance with section 804.1102. Lastly, 819.307 is clarified to explain that if a SDVOSB or VOSB status protest is granted, if contract award has already been made, VA will not be required to terminate the award but will not be able to count that award towards its small business accomplishments, which is consistent with current Government Accountability Office protest decisions on similar matters.

#### Administrative Procedure Act

This document additionally revises section 819.307, SDVOSB/VOSB Small Business Status Protests, of the proposed rule, where VA provided that VA would utilize the SBA to consider and decide SDVOSB and VOSB status protests. This requires VA and SBA to execute an interagency agreement pursuant to the Economy Act, 31 U.S.C. 1535. Negotiations of this interagency agreement have not yet been finalized. Therefore, VA has amended section 819.307 with an interim rule to provide that VA's

Executive Director, OSDDBU shall consider and decide SDVOSB and VOSB status protests, and provides procedures there for, until such time as the interagency agreement is executed by the agencies. Good cause exists for the agency to include this change as an interim rule because it is essential for this contracting program to function. Without a SDVOSB/VOSB status protest resolution process in place for acquisitions under this authority, performance of any contract award so challenged would be suspended thus depriving VA and veterans of necessary services and/or supplies. VA hereby solicits comments on this regulatory amendment only.

#### Other Non-Substantive Changes

The changes below serve to clarify particular items from the proposed rule in this final rule.

Section 802.101 has been revised to state that the term ``small business concern'' has the same meaning as in Federal Acquisition Regulation 2.101.

The proposed rule contained a provision at sections 819.7007(b) and 819.7008(b) indicating no protest is authorized in connection with the issuance or proposed issuance of a contract under this section, on the basis that more than one SDVOSB or VOSB, respectively, is available to meet the requirement. In the proposed rule, VA sought to remove this question as an issue subject to protest. Upon further consideration, VA has determined that it is not legally proper to affect protest jurisdiction established by 31 U.S.C. 3551 et seq. or 28 U.S.C. 1491 by this rule. In addition, these provisions are being removed in the final rule to provide the added benefit of transparency of the procurement process.

In the proposed rule it was stated in section 819.7109(b) that OSDDBU would forward copies of approved Mentor-Prot[ecute]g[ecute] Agreements to the VA contracting officer for any VA contracts affected by that Agreement. Section 819.7109(b) is revised in the final rule to state that approved Mentor-Prot[ecute]g[ecute] Agreements will be posted on a VA Web site, which will be accessible to VA contracting officers for their review. This change is being made to more efficiently use the resources that are available and to increase the transparency of VA's procurement process. Electronic posting of agreements obviates the need to forward paper copies of the agreements to VA contracting officers and makes the agreements more accessible to contracting officers.

#### Regulatory Flexibility Act

VA has determined that this rule establishing priority to small business concerns owned and controlled by veterans may have a significant economic impact on a substantial number of small entities within the

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meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, et seq. Accordingly, VA prepared an Initial Regulatory Flexibility Analysis (IRFA) addressing the impact of the proposed rule in accordance with 5 U.S.C. 603. The IRFA examined the objectives and legal basis for the

proposed rule; the kind and number of small entities that may be affected; the projected recordkeeping, reporting, and other requirements; whether there were any federal rules that may duplicate, overlap, or conflict with the proposed rule; and whether there were any significant alternatives to the proposed rule.

VA's Final Regulatory Flexibility Analysis (FRFA) is set forth below:

1. What are the reasons for, and objectives of, this final rule?

Sections 502 and 503 of Public Law 109-461 require VA to create a unique acquisition program among Federal agencies that permits preferences for SDVOSBs and VOSBs. This final rule will permit VA contracting officers to conduct acquisition actions with preferences for SDVOSBs or VOSBs. Specifically, this final rule will allow VA contracting officers to:

a. Under certain conditions, permit other than competitive procedures under the simplified acquisition threshold with SDVOSBs or VOSBs;

b. Require set-asides for SDVOSBs or VOSBs above the simplified acquisition threshold when the contracting officer has a reasonable expectation that two or more eligible SDVOSBs or VOSBs 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;

c. Under certain conditions, permit other than competitive sourcing for SDVOSBs or VOSBs above the simplified acquisition threshold when the contracting officer determines that a fair and reasonable price will be obtained as a result of negotiations for requirements not to exceed \$5 million;

d. Include evaluation factors in negotiated acquisitions and FSS acquisitions that give preference to SDVOSBs and VOSBs and preference to offerors who propose to include such businesses as subcontractors;

e. Require offerors who propose to use SDVOSBs or VOSBs as subcontractors to use eligible businesses;

f. Require VOSBs participating in the Department's acquisitions to register in the VetBiz.gov VIP database and VA verify that the business meets eligibility requirements;

g. Establish a VA Mentor-Prot[eacute]g[eacute] Program and give large businesses that participate in the program a preference in the award of VA prime contracts;

h. Encourage prime contractors and mentors to assist SDVOSBs and VOSBs in obtaining bonding when required;

i. Recommend debarment of any business that misrepresents ownership and control of the business for purposes of registering in the VetBiz.gov VIP database or other Federal databases; and

j. Under certain conditions, acquire supplies and services from SDVOSBs and VOSBs in lieu of FPI.

2. Summary of the Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis, a Summary of the Assessment of the Agency of Such Issues, and a Statement of any Changes Made as a Result of Such Comments.

VA has set forth an analysis of the public comments on the Proposed Rule in the supplementary information section of this final rule. VA received one comment in response to the IRFA. The commenter, an SDVOSB owner, urged VA to maintain the economic categories and keep constant the number of contracts awarded to certified HUBZone, 8(a), and woman-owned small business (WOSB) concerns. The commenter stated that the

increase of contracts to SDVOSB/VOSBs under the Veterans First rule should come at the expense of the 65-percent allocated for large businesses and not the 35-percent for small businesses. The Veterans First rule does provide a priority for SDVOSB/VOSBs over other small business concerns and implements a new small business set-aside authority for SDVOSB/VOSBs. The underlying statutory authority for this rule does not authorize VA to provide that all awards to SDVOSB/VOSBs come solely at the expense of large businesses. Therefore, VA believes that the IRFA analysis was accurate.

3. What is VA's description and estimate of the number of small entities to which the rule will apply?

The RFA directs agencies to provide a description, and where feasible, an estimate of the number of small business concerns that may be affected by the rule. It is difficult to estimate the number of concerns that will participate in this program because there is insufficient data on SDVOSBs or VOSBs that are ready and able to perform on VA requirements. To establish the likely number of SDVOSBs or VOSBs that may benefit from VA's unique procurement authority, there are two principal data sources: VA's VetBiz.gov VIP database and the Central Contractor Registration (CCR) database. VA maintains a list of veteran small businesses in its VetBiz.gov VIP database. A VIP query returned 15,904 VOSBs, including 9,020 SDVOSBs. The VIP database requires that businesses answer eligibility questions before they are permitted to register their business. VA finds that these searches reasonably represent the number of SDVOSBs and VOSBs that may be affected by the rule.

The CCR is a self-representation database where small businesses are responsible for identifying their size and socio-economic status. A CCR Dynamic Small Business Search query conducted on March 6, 2009, returned 43,273 VOSBs, including 14,093 SDVOSBs.

Under this final rule, VA contracting teams will be required to give priority consideration to SDVOSBs and VOSBs when using other contracting programs, like set-asides for the Historically Underutilized Business (HUB) Zone Program or the Section 8(a) Business Development Program reserved actions or the Small Business Set-aside Program. A CCR Dynamic Small Business Search conducted on March 6, 2009, returned 10,697 active HUBZone firms. Of this population, 1,961, or 18 percent, are also VOSBs. A search of active Section 8(a) businesses identified 9,385 current firms, which includes 1,267 VOSBs, or 13.5 percent of the total population. There are 69,865 woman-owned small businesses (WOSBs) in the CCR, of which 4,419 appear to also be VOSBs. VA notes that SBA is in the process of establishing a WOSB Set-aside Program, making the percentage of WOSBs who are also VOSBs eligible of interest to the Department.

Based on this unique procurement authority, VA believes the final rule will be small business neutral and that teams will organize with different lead parties. VA has a long tradition of performing well with small business programs. In July 2008, SBA certified the performance data for fiscal year (FY) 2007. In a report which appears on SBA's Web site, "FY 2007 Small Business Goaling Report," VA reported the following actions, dollars and percentages of total procurement with small business programs:

Small Business Actions: 2,506,303; Small Business Dollars: \$3,854,687,943.57; Percentage of Total Procurement: 32.85.

VOSB Actions: 399,541; VOSB Dollars: \$1,216,580,370.73;

Percentage of Total Procurement: 10.37.

SDBVOSB Actions: 51,304; SDVOSB Dollars: \$831,811,813.84;

Percentage of Total Procurement: 7.09.

Small Disadvantaged Business (SDB) Actions: 89,767; SDB Dollars: \$1,029,410,495.34; Percentage of Total Procurement: 8.77.

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Section 8(a) Business Development Program Actions: 4,352; Section 8(a) Dollars: \$450,897,322.73; Percentage of Total Procurement: 3.84.

WOSB Actions: 260,491; WOSB Dollars: \$583,657,495.86; Percentage of Total Procurement: 4.97.

HUBZone Actions: 171,540; HUBZone Dollars: \$388,439,407.06; Percentage of Total Procurement: 3.31.

As noted above, only a small percentage of veterans own small businesses. With this new procurement authority, additional businesses may be opened by veterans seeking to participate in the sole source or set-aside procurement actions. More likely, VOSBs not currently in the Federal market may be expected to explore selling to VA. Thus, the population of known VOSBs may increase as these businesses register in the VetBiz.gov VIP database. This growth is necessary as section 502 of Public Law 109-461 also requires that VA's large prime contractors use eligible businesses to receive subcontracting program credit for VOSBs and SDVOSBs. With respect to who will benefit from this regulation, VA believes that SDVOSBs and VOSBs and the Department will benefit from the greater flexibility to contract with veterans in business, enhancing their unique relationship with VA.

4. What Are the Projected Reporting, Recordkeeping, Paperwork Reduction Act and Other Compliance Requirements?

There are two categories of coverage in this final rule that could potentially require the collection of information from contractors. VA will ask prime contractors who seek a preference for subcontracting with SDVOSBs or VOSBs to provide information about the identity of SDVOSBs or VOSBs, the approximate dollar value of the proposed subcontracts, and confirmation that the proposed subcontractors are eligible SDVOSBs or VOSBs as verified by the VetBiz.gov VIP database. VA also will collect information from participants in VA's Mentor-Prot[acute]g[acute] Program, to include the program agreement, developmental plan, and reports on the success of the program.

5. Description of the Steps VA Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule.

This final rule is designed to benefit SDVOSBs and VOSBs. There are no alternatives which would accomplish the stated objectives of sections 502 and 503 of Public Law 109-461 to give contracting priority to SDVOSBs and VOSBs.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits

(including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a "significant regulatory action," requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this final rule have been examined, and it has been determined to be a significant regulatory action under Executive Order 12866 because it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or principles set forth in the Executive Order.

#### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995, at 2 U.S.C. 1532, requires that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by state, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any given year. This rule would have no such effect on state, local, or tribal governments, or on the private sector.

#### Paperwork Reduction Act

This final rule contains provisions in VAAR sections 819.7108 and 819.7113 that constitute collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521). OMB has approved the proposed collections and has assigned control number 2900-0723 to them.

#### List of Subjects

48 CFR Parts 802, 804, 808, 809, 810, 813, 815, and 817

Government procurement, Reporting and recordkeeping requirements, Utilities.

48 CFR Part 819

Administrative practice and procedure, Government procurement, Reporting and recordkeeping requirements, Small business, Veterans.

48 CFR Part 828

Government procurement, Insurance, Surety bonds.

## 48 CFR Part 852

Government procurement, Reporting and recordkeeping requirements.

Approved: August 25, 2009.

John R. Gingrich,  
Chief of Staff, Department of Veterans Affairs.

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For the reasons stated in the preamble, the Department of Veterans Affairs amends 48 CFR Chapter 8 as follows:

## CHAPTER 8--DEPARTMENT OF VETERANS AFFAIRS

## Subchapter A--General

## PART 802--DEFINITIONS OF WORDS AND TERMS

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1. The authority citation for part 802 is revised to read as follows:

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c) and (d);  
and 48 CFR 1.301-1.304.

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2. Amend section 802.101 by adding in alphabetical order the following terms:

## 802.101 Definitions.

\* \* \* \* \*

Service-disabled veteran-owned small business concern (SDVOSB) has the same meaning as defined in the Federal Acquisition Regulation (FAR) part 2.101, except for acquisitions authorized by 813.106 and subpart 819.70. These businesses must then be listed as verified on the Vendor Information Pages (VIP) database at <http://www.vetbiz.gov>. In addition, some businesses may be owned and controlled by a surviving spouse.

\* \* \* \* \*

Small business concern has the same meaning as defined in FAR 2.101.

Surviving spouse means an individual who has been listed in the Department of Veterans Affairs' (VA) Veterans

[[Page 64630]]

Benefits Administration (VBA) database of veterans and family members. To be eligible for inclusion in the VetBiz.gov VIP database, the following conditions must apply:

(1) If the death of the veteran causes the small business concern to be less than 51 percent owned by one or more service-disabled veterans, the surviving spouse of such veteran who acquires ownership rights in such small business shall, for the period described below, be treated as if the surviving spouse were that veteran for the purpose of

maintaining the status of the small business concern as a service-disabled veteran-owned small business.

(2) The period referred to above is the period beginning on the date on which the veteran dies and ending on the earliest of the following dates:

(i) The date on which the surviving spouse remarries;

(ii) The date on which the surviving spouse relinquishes an ownership interest in the small business concern;

(iii) The date that is 10 years after the date of the veteran's death; or

(iv) The date on which the business concern is no longer small under federal small business size standards.

(3) The veteran must have had a 100 percent service-connected disability rating or the veteran died as a direct result of a service-connected disability.

\* \* \* \* \*

Vendor Information Pages (VIP) means the VetBiz.gov Vendor Information Pages database at <http://www.vetbiz.gov>.

Veteran-owned small business concern (VOSB) has the same meaning as defined in FAR 2.101, except for acquisitions authorized by 813.106 and 819.70. These businesses must then be listed as verified in the VetBiz.gov VIP database.

\* \* \* \* \*

#### PART 804--ADMINISTRATIVE MATTERS

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3. The authority citation for part 804 is revised to read as follows:

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c) and (d); and 48 CFR 1.301-1.304.

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4. Add section 804.1102 to read as follows:

#### 804.1102 Vendor Information Pages (VIP) Database

Prior to January 1, 2012, all VOSBs and SDVOSBs must be listed in the VIP database, available at <http://www.VetBiz.gov>, and also must be registered in the Central Contractor Registration (CCR) (see 48 CFR subpart 4.11) to receive contract awards under VA's Veteran-owned Small Business prime contracting and subcontracting opportunities program. After December 31, 2011, all VOSBs, including SDVOSBs, must be listed as verified in the VIP database, and also must be registered in the CCR to be eligible to participate in order to receive new contract awards under this program.

#### PART 808--REQUIRED SOURCES OF SUPPLIES AND SERVICES

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5. The authority citation for part 808 is revised to read as follows:

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c) and (d);

and 48 CFR 1.301-1.304.

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6. Section 808.405-2 is added to read as follows:

808.405-2 Ordering procedure for services requiring a statement of work.

When placing an order or establishing a BPA for supplies or services requiring a statement of work, the ordering activity, when developing the statement of work and any evaluation criteria in addition to price, shall adhere to and apply the evaluation factor commitments at 815.304-70.

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7. Add subpart 808.6 consisting of section 808.603 to read as follows:

Subpart 808.6--Acquisition From Federal Prison Industries, Inc. (FPI)

808.603 Purchase Priorities

Contracting officers may purchase supplies and services produced or provided by FPI from eligible service-disabled veteran-owned small businesses and veteran-owned small businesses, in accordance with procedures set forth in subpart 819.70, without seeking a waiver from FPI, in accordance with 38 U.S.C. 8128, Small business concerns owned and controlled by veterans: Contracting priority.

PART 809--CONTRACTOR QUALIFICATIONS

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8. The authority citation for part 809 is revised to read as follows:

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c) and (d); and 48 CFR 1.301-1.304.

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9. Add section 809.406-2 to read as follows:

809.406-2 Cause for debarment.

(a) Misrepresentation of VOSB or SDVOSB eligibility may result in action taken by VA officials to debar the business concern for a period not to exceed 5 years from contracting with VA as a prime contractor or a subcontractor.

(b) Any deliberate violation of the limitation on subcontracting clause requirements for acquisitions under subpart 819.70 may result in action taken by VA officials to debar any service-disabled veteran-

owned, veteran-owned small business concern or any large business concern involved in such action.

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10-12. Part 810 is added to read as follows:

#### PART 810--MARKET RESEARCH

810.001 Market research policy.

810.002 Market research procedures.

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c) and (d); and 48 CFR 1.301-1.304.

810.001 Market research policy.

When conducting market research, VA contracting teams shall use the VIP database, at <http://www.VetBiz.gov>, in addition to other sources of information.

810.002 Market research procedures.

Contracting officers shall record VIP queries in the solicitation file by printing the results of the search(s) along with specific query used to generate the search(s).

#### PART 813--SIMPLIFIED ACQUISITION PROCEDURES

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13. The authority citation for part 813 is revised to read as follows:

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c) and (d); and 48 CFR 1.301-1.304.

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14. Revise section 813.106 to read as follows:

813.106 Soliciting competition, evaluation of quotations or offers, award and documentation.

(a) Contracting officers may use other than competitive procedures to enter into a contract with a SDVOSB or VOSB when the amount exceeds the micro-purchase threshold up to \$5 million.

(b) Requirements exceeding \$25,000 must be synopsisized in accordance with FAR Part 5.

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15. Add subpart 813.2, consisting of section 813.202, to read as follows:

## Subpart 813.2--Actions at or Below the Micro-Purchase Threshold

## 813.202 Purchase guidelines.

Open market micro-purchases shall be equitably distributed among all qualified SDVOSBs or VOSBs, respectively, to the maximum extent practicable.

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## PART 815--CONTRACTING BY NEGOTIATION

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16. The authority citation for part 815 is revised to read as follows:

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c); and 48 CFR 1.301-1.304.

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17. Add section 815.304 to read as follows:

## 815.304 Evaluation factors and significant subfactors.

(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.

(b) Additional consideration shall also be given to any offeror, regardless of size status, that proposes to subcontract with SDVOSBs or VOSBs.

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18. Add section 815.304-70 to read as follows:

## 815.304-70 Evaluation factor commitments.

(a) VA contracting officers shall:

(1) Include provisions in negotiated solicitations giving preference to offers received from VOSBs and additional preference to offers received from SDVOSBs;

(2) Use past performance in meeting SDVOSB subcontracting goals as a non-price evaluation factor in selecting offers for award;

(3) Use the proposed inclusion of SDVOSBs or VOSBs as subcontractors as an evaluation factor when competitively negotiating the award of contracts or task or delivery orders; and

(4) Use participation in VA's Mentor-Prot[eg]g[eg] Program as an evaluation factor when competitively negotiating the award of contracts or task or delivery orders.

(b) If an offeror proposes to use an SDVOSB or VOSB subcontractor in accordance with 852.215-70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors, the contracting

officer shall ensure that the offeror, if awarded the contract, actually does use the proposed subcontractor or another SDVOSB or VOSB subcontractor for that subcontract or for work of similar value.

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19. Add section 815.304-71 to read as follows:

815.304-71 Solicitation provision and clause

(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.

(b) The contracting officer shall insert the clause at 852.215-71, Evaluation Factor Commitments, in solicitations and contracts that include VAAR clause 852.215-70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors.

PART 817--SPECIAL CONTRACTING METHODS

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20. The authority citation for part 817 is added to read as follows:

Authority: 38 U.S.C. 8127.

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21. Add subpart 817.5 consisting of section 817.502 to read as follows:

Subpart 817.5--Interagency Acquisitions Under the Economy Act

817.502 General

(a) After December 31, 2008, any contract, memorandum of understanding, agreement, or other arrangement with any governmental entity to acquire goods and services, shall include in such contract, memorandum, agreement, or other arrangement a requirement that the entity will comply, to the maximum extent feasible, with the provisions of 38 U.S.C. 8127 and 8128, as implemented by the VA Acquisition Regulation, in acquiring such goods or services.

(b) Nothing in this subsection shall be construed to supersede or otherwise affect the authorities provided under the Small Business Act (15 U.S.C. 631 et seq.).

PART 819--SMALL BUSINESS PROGRAMS

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22. The authority citation for part 819 is revised to read as follows:

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c) and (d); 48 CFR 1.301-1.304; and 15 U.S.C. 637(d)(4)(E).

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23. Revise section 819.201 to read as follows:

#### 819.201 General policy

The Secretary shall establish goals for each fiscal year for participation in Department contracts by SDVOSBs and VOSBs. In order to establish contracting priority for veteran-owned and controlled small businesses in accordance with 38 U.S.C. 8128, the Secretary may decrease other status-specific small business goals set forth by section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)) upon consultation with the Administrator of the U.S. Small Business Administration (SBA).

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24. Add subpart 819.3 consisting of section 819.307 to read as follows:

Subpart 819.3--Determination of Small Business Status for Small Business Programs

#### 819.307 SDVOSB/VOSB Small Business Status Protests

(a) All protests relating to whether an eligible VOSB or SDVOSB is a ``small'' business for the purposes of any Federal program are subject to 13 CFR Part 121 and must be filed in accordance with that part. For acquisitions under the authority of subpart 819.70, upon execution of an interagency agreement between VA and the SBA pursuant to the Economy Act (31 U.S.C. 1535), regarding service-disabled veteran-owned or veteran-owned small business status, contracting officers shall forward all status protests to the Director, Office of Government Contracting (D/GC), U.S. Small Business Administration (ATTN: VAAR Part 819 SDVOSB/VOSB Small Business Status Protests), 409 3rd Street, SW., Washington, DC 20416, for disposition. Except for ownership and control issues to be determined in accordance with 38 CFR Part 74, protests shall follow the procedures set forth in FAR 19.307 for both service-disabled veteran-owned and veteran-owned small business status. However, contracting officers shall be solely responsible for determining VOSB and SDVOSB compliance with VAAR 804.1102.

(b) If SBA sustains a service-disabled veteran-owned or veteran-owned small business status protest and the contract has already been awarded, then the contracting officer cannot count the award as an award to a VOSB or SDVOSB and the concern cannot submit another offer as a VOSB or SDVOSB on a future VOSB or SDVOSB procurement under this part, as applicable, unless it demonstrates to VA that it has overcome the reasons for the determination of ineligibility.

(c) Until execution of the interagency agreement referenced in subsection (a), for acquisitions under the authority of subpart 819.70, the Executive Director, VA Office of Small and Disadvantaged Business Utilization (OSDBU) shall decide all protests on service-disabled veteran-owned or veteran-owned small business status whether raised by

the contracting officer or an offeror. Ownership and control shall be determined in accordance with 38 CFR Part 74. The Executive Director's decision shall be final.

(1) All protests must be in writing and must state all specific grounds for the protest. Assertions that a protested

[[Page 64632]]

concern is not a service-disabled veteran-owned or veteran-owned small business concern, without setting forth specific facts or allegations, are insufficient. An offeror must submit its protest to the contracting officer. An offeror must deliver their protest in person, by facsimile, by express delivery service, or by the U.S. Postal Service within the applicable time period to the contracting officer.

(2) An offeror's protest must be received by close of business on the fifth business day after bid opening (in sealed bid acquisitions) or by close of business on the fifth business day after notification by the contracting officer of the apparently successful offeror (in negotiated acquisitions). Any protest received after these time limits is untimely. Any protest received prior to bid opening or notification of intended award, whichever applies, is premature and shall be returned to the protester.

(3) If the Executive Director sustains a service-disabled veteran-owned or veteran-owned small business status protest and the contract has already been awarded, then the contracting officer cannot count the award as an award to a VOSB or SDVOSB and the concern cannot submit another offer as a VOSB or SDVOSB on a future VOSB or SDVOSB procurement under this part, as applicable, unless it demonstrates to VA that it has overcome the reasons for the determination of ineligibility.

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25-27. Add subpart 819.7 consisting of sections 819.704, 819.705, and 819.709 to read as follows:

Subpart 819.7--The Small Business Subcontracting Program

819.704 Subcontracting plan requirements.

(a) The contracting officer shall ensure that any subcontracting plans submitted by offerors include a goal that is at least commensurate with the annual VA SDVOSB prime contracting goal for the total value of planned subcontracts.

(b) The contracting officer shall ensure that any subcontracting plans submitted by offerors include a goal that is at least commensurate with the annual VA VOSB prime contracting goal for the total value of all planned subcontracts.

(c) VA's OSDBU shall review all prime contractor's subcontracting plan achievement reports to ensure that, in the case of a subcontract that is counted for purposes of meeting a goal in accordance with subparagraphs (a) and (b) of this section, the subcontract was actually awarded to a business concern that is eligible to be counted toward

meeting the goal, as provided in 804.1102.

#### 819.705 Appeal of Contracting Officer Decisions.

(a) Acquisitions not exceeding the simplified acquisition threshold (SAT) and 819.7007 and 819.7008 are excluded from this section.

(b) When an interested party intends to appeal a contracting officer's decision to not use the set-aside authority contained in subpart 819.70, the party shall notify the contracting officer, in writing, of its intent to challenge the decision. The contracting officer has 5 working days to reply to the challenge by either revising the strategy or indicating the rationale for not setting-aside the requirement. Upon receipt of the decision, the interested party may appeal to the Head of the Contracting Activity (HCA). Such appeal shall be filed within 5 working days of receipt of the contracting officer's decision. The HCA has 5 working days to respond to the appeal. The contracting officer shall suspend action on the acquisition unless the HCA makes a written determination that urgent circumstances exist which would significantly affect the interests of the government. The decision of the HCA shall be final.

(c) Prime contractors submitting businesses declared ineligible for credit in SDVOSB and/or VOSB subcontracting plans may appeal to the Executive Director, Office of Small and Disadvantaged Business Utilization and Center for Veterans Enterprise (00VE), U.S. Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, within 5 working days of receipt of information declaring their subcontractor ineligible. The Executive Director shall have 5 working days to respond. The decision of the Executive Director may be appealed to the Senior Procurement Executive (SPE) within 5 working days. The SPE shall have 15 working days to respond and that decision shall be final.

#### 819.709 Contract clause.

The contracting officer shall insert VAAR clause 852.219-9, Small Business Subcontracting Plan Minimum Requirements, in solicitations and contracts that include FAR clause 52.219-9, Small Business Subcontracting Plan.

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28. Revise subpart 819.70 to read as follows:

Subpart 819.70--Service-Disabled Veteran-Owned and Veteran-Owned Small Business Acquisition Program

Sec.

819.7001 General.

819.7002 Applicability.

819.7003 Eligibility.

819.7004 Contracting Order of Priority.

819.7005 Service-disabled veteran-owned small business set-aside procedures.

819.7006 Veteran-owned small business set-aside procedures.

819.7007. Sole source awards to service-disabled veteran-owned small business concerns.

819.7008 Sole source awards to veteran-owned small business concerns.

819.7009 Contract clauses.

819.7001 General.

(a) Sections 502 and 503 of the Veterans Benefits, Health Care, and Information Technology Act of 2006 (38 U.S.C. 8127-8128), created an acquisition program for small business concerns owned and controlled by service-disabled veterans and those owned and controlled by veterans for VA.

(b) The purpose of the program is to provide contracting assistance to SDVOSBs and VOSBs.

819.7002 Applicability.

This subpart applies to VA contracting activities and to its prime contractors. Also, this subpart applies to any government entity that has a contract, memorandum of understanding, agreement, or other arrangement with VA to acquire goods and services for VA in accordance with 817.502.

819.7003 Eligibility.

(a) Eligibility of SDVOSBs and VOSBs continues to be governed by the Small Business Administration regulations, 13 CFR subparts 125.8 through 125.13, as well as the FAR, except where expressly directed otherwise by the VAAR, and 38 CFR verification regulations for SDVOSBs and VOSBs.

(b) At the time of submission of offer, the offeror must represent to the contracting officer that it is a--

(1) SDVOSB concern or VOSB concern;

(2) Small business concern under the North American Industry Classification System (NAICS) code assigned to the acquisition; and

(3) Verified for eligibility in the VIP database.

(c) A joint venture may be considered an SDVOSB or VOSB concern if

(1) At least one member of the joint venture is an SDVOSB or VOSB concern, and makes the representations in paragraph (b) of this section;

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(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement;

(3) The joint venture meets the requirements of paragraph 7 of the size standard explanation of affiliates in FAR 19.101; and

(4) The joint venture meets the requirements of 13 CFR 125.15(b), modified to include veteran-owned small businesses where this CFR section refers to SDVOSB concerns.

(d) Any SDVOSB or VOSB concern (nonmanufacturer) must meet the

requirements in FAR 19.102(f) to receive a benefit under this program.

#### 819.7004 Contracting Order of Priority.

In determining the acquisition strategy applicable to an acquisition, the contracting officer shall consider, in the following order of priority, contracting preferences that ensure contracts will be awarded:

- (a) To SDVOSBs;
- (b) To VOSB, including but not limited to SDVOSBs;
- (c) Pursuant to--
  - (1) Section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or
  - (2) The Historically-Underutilized Business Zone (HUBZone) Program (15 U.S.C. 657a); and
- (d) Pursuant to any other small business contracting preference.

#### 819.7005 Service-disabled veteran-owned small business set-aside procedures.

(a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer shall set-aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that,

(1) Offers will be received from two or more eligible SDVOSB concerns; and

(2) Award will be made at a fair and reasonable price.

(b) When conducting SDVOSB set-asides, the contracting officer shall ensure:

(1) Eligibility is extended to businesses owned and operated by surviving spouses; and

(2) Businesses are registered and verified as eligible in the VIP database prior to making an award.

(c) If the contracting officer receives only one acceptable offer at a fair and reasonable price from an eligible SDVOSB concern in response to a SDVOSB set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from eligible SDVOSB concerns, the set-aside shall be withdrawn and the requirement, if still valid, set aside for VOSB competition, if appropriate.

#### 819.7006 Veteran-owned small business set-aside procedures.

(a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer shall set aside an acquisition for competition restricted to VOSB concerns upon a reasonable expectation that:

(1) Offers will be received from two or more eligible VOSB concerns; and

(2) Award will be made at a fair and reasonable price.

(b) If the contracting officer receives only one acceptable offer

at a fair and reasonable price from an eligible VOSB concern in response to a VOSB set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from eligible VOSB concerns, the set-aside shall be withdrawn and the requirement, if still valid, set aside for other small business programs, as appropriate.

(c) When conducting VOSB set-asides, the contracting officer shall ensure the business is registered and verified as eligible in the VIP database prior to making an award.

819.7007 Sole source awards to service-disabled veteran-owned small business concerns.

(a) A contracting officer may award contracts to SDVOSB concerns on a sole source basis provided:

(1) The anticipated award price of the contract (including options) will not exceed \$5 million;

(2) The requirement is synopsised in accordance with FAR part 5;

(3) The SDVOSB concern has been determined to be a responsible contractor with respect to performance; and

(4) Award can be made at a fair and reasonable price.

(b) The contracting officer's determination whether to make a sole source award is a business decision wholly within the discretion of the contracting officer. A determination that only one SDVOSB concern is available to meet the requirement is not required.

(c) When conducting a SDVOSB sole source acquisition, the contracting officer shall ensure businesses are registered and verified as eligible in the VIP database prior to making an award.

819.7008 Sole source awards to veteran-owned small business concerns.

(a) A contracting officer may award contracts to VOSB concerns on a sole source basis provided:

(1) The anticipated award price of the contract (including options) will not exceed \$5 million;

(2) The requirement is synopsised in accordance with FAR part 5;

(3) The VOSB concern has been determined to be a responsible contractor with respect to performance;

(4) Award can be made at a fair and reasonable price; and

(5) No responsible SDVOSB concern has been identified.

(b) The contracting officer's determination whether to make a sole source award is a business decision wholly within the discretion of the contracting officer. A determination that only one VOSB concern is available to meet the requirement is not required.

(c) When conducting a VOSB sole source acquisition, the contracting officer shall ensure businesses are registered and verified as eligible in the VIP database prior to making an award.

819.7009 Contract clauses.

The contracting officer shall insert VAAR clause 852.219-10, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside or

852.219-11, Notice of Total Veteran-Owned Small Business Set-Aside in solicitations and contracts for acquisitions under this subpart.

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29. Add subpart 819.71 to read as follows:

Subpart 819.71--VA Mentor-Prot[acute]g[acute] Program  
Sec.

819.7101 Purpose.

819.7102 Definitions.

819.7103 Non-affiliation.

819.7104 General policy.

819.7105 Incentives for mentor participation.

819.7106 Eligibility of Mentor and Prot[acute]g[acute] firms.

819.7107 Selection of Prot[acute]g[acute] firms.

819.7108 Application process.

819.7109 VA review of application.

819.7110 Developmental assistance.

819.7111 Obligations under the Mentor-Prot[acute]g[acute] Program.

819.7112 Internal controls.

819.7113 Reports.

819.7114 Measurement of program success.

819.7115 Solicitation provisions.

Authority: 38 U.S.C. 501.

Subpart 819.71--VA Mentor-Prot[acute]g[acute] Program

819.7101 Purpose.

The VA Mentor-Prot[acute]g[acute] Program is designed to assist service-disabled

[[Page 64634]]

veteran-owned small businesses (SDVOSBs) and veteran-owned small businesses (VOSBs) in enhancing their capabilities to perform contracts and subcontracts for VA. The Mentor-Prot[acute]g[acute] Program is also designed to improve the performance of VA contractors and subcontractors by providing developmental assistance to prot[acute]g[acute] entities, fostering the establishment of long-term business relationships between SDVOSBs, VOSBs and prime contractors, and increasing the overall number of SDVOSBs and VOSBs that receive VA contract and subcontract awards. A firm's status as a prot[acute]g[acute] under a VA contract shall not have an effect on the firm's eligibility to seek other prime contracts or subcontracts.

819.7102 Definitions.

(a) A Mentor is a contractor that elects to promote and develop SDVOSBs and/or VOSBs by providing developmental assistance designed to enhance the business success of the prot[acute]g[acute]. A mentor may be a large or small business concern.

(b) OSDBU is the Office of Small and Disadvantaged Business

Utilization. This is the VA office responsible for administering, implementing and coordinating the Department's small business programs, including the Mentor-Prot[eacute]g[eacute] Program.

(c) Program refers to the VA Mentor-Prot[eacute]g[eacute] Program as described in this Subpart.

(d) Prot[eacute]g[eacute] means a SDVOSB or VOSB, as defined in 802.101, which meets federal small business size standards in its primary NAICS code and which is the recipient of developmental assistance pursuant to a Mentor-Prot[eacute]g[eacute] agreement.

#### 819.7103 Non-affiliation.

A Prot[eacute]g[eacute] firm will not be considered an affiliate of a mentor firm solely on the basis that the prot[eacute]g[eacute] firm is receiving developmental assistance from the mentor firm under VA's Mentor-Prot[eacute]g[eacute] Program. The determination of affiliation is a function of the SBA.

#### 819.7104 General policy.

(a) To be eligible, mentors and prot[eacute]g[eacute]s must not be listed on the Excluded Parties List System, located at <http://www.epls.gov>. Mentors will provide appropriate developmental assistance to enhance the capabilities of prot[eacute]g[eacute]s to perform as prime contractors and/or subcontractors.

(b) VA reserves the right to limit the number of participants in the program in order to ensure its effective management of the Mentor-Prot[eacute]g[eacute] Program.

#### 819.7105 Incentives for prime contractor participation.

(a) Under the Small Business Act, 15 U.S.C. 637(d)(4)(e), VA is authorized to provide appropriate incentives to encourage subcontracting opportunities for small business consistent with the efficient and economical performance of the contract. This authority is limited to negotiated procurements. FAR 19.202-1 provides additional guidance.

(b) Costs incurred by a mentor to provide developmental assistance, as described in 819.7110 to fulfill the terms of their agreement(s) with a prot[eacute]g[eacute] firm(s), are not reimbursable as a direct cost under a VA contract. If VA is the mentor's responsible audit agency under FAR 42.703-1, VA will consider these costs in determining indirect cost rates. If VA is not the responsible audit agency, mentors are encouraged to enter into an advance agreement with their responsible audit agency on the treatment of such costs when determining indirect cost rates.

(c) In addition to subparagraph (b) of this section, contracting officers shall give mentors evaluation credit under 852.219-52, Evaluation Factor for Participation in the VA Mentor-Prot[eacute]g[eacute] Program, considerations for subcontracts awarded pursuant to their Mentor-Prot[eacute]g[eacute] Agreements and their subcontracting plans. Therefore:

(1) Contracting officers may evaluate subcontracting plans containing mentor-prot[eacute]g[eacute] arrangements more favorably than subcontracting plans without Mentor-Prot[eacute]g[eacute] Agreements.

(2) Contracting officers may assess the prime contractor's compliance with the subcontracting plans submitted in previous contracts as a factor in evaluating past performance under FAR 15.305(a)(2)(v) and determining contractor responsibility 19.705-5(a)(1).

(d) OSDBU Mentoring Award. A non-monetary award will be presented annually to the mentoring firm providing the most effective developmental support to a prot[eacute]g[eacute]. The Mentor-Prot[eacute]g[eacute] Program Manager will recommend an award winner to the OSDBU Director.

(e) OSDBU Mentor-Prot[eacute]g[eacute] Annual Conference. At the conclusion of each year in the Mentor-Prot[eacute]g[eacute] Program, mentor firms will be invited to brief contracting officers, program leaders, office directors and other guests on program progress.

#### 819.7106 Eligibility of Mentor and Prot[eacute]g[eacute] firms.

Eligible business entities approved as mentors may enter into agreements (hereafter referred to as ``Mentor-Prot[eacute]g[eacute] Agreement'' or ``Agreement'' and explained in 819.7108) with eligible prot[eacute]g[eacute]s. Mentors provide appropriate developmental assistance to enhance the capabilities of prot[eacute]g[eacute]s to perform as contractors and/or subcontractors. Eligible small business entities capable of providing developmental assistance may be approved as mentors. Prot[eacute]g[eacute]s may participate in the program in pursuit of a prime contract or as subcontractors under the mentor's prime contract with VA, but are not required to be a subcontractor to a VA prime contractor or be a VA prime contractor.

(a) Eligibility. A Mentor:

(1) May be either a large or small business entity and either a prime contractor or subcontractor;

(2) Must be able to provide developmental assistance that will enhance the ability of Prot[eacute]g[eacute]s to perform as prime contractors or subcontractors; and

(3) Will be encouraged to enter into arrangements with entities with which it has established business relationships.

(b) Eligibility. A Prot[eacute]g[eacute]:

(1) Must be a SDVOSB or VOSB as defined in 802.101;

(2) Must meet the size standard corresponding to the NAICS code that the Mentor prime contractor believes best describes the product or service being acquired by the subcontract; and

(c) Prot[eacute]g[eacute]s may have multiple mentors.

Prot[eacute]g[eacute]s participating in mentor-prot[eacute]g[eacute] programs in addition to VA's Program should maintain a system for preparing separate reports of mentoring activity so that results of VA's Program can be reported separately from any other agency program.

(d) A prot[eacute]g[eacute] firm shall self-represent to a mentor firm that it meets the requirements set forth in paragraph (b) of this section. Mentors shall confirm eligibility by documenting the verified status of the prot[eacute]g[eacute] in the VetBiz.gov VIP database.

Prot[eacute]g[eacute]s must maintain verified status throughout the term of the Mentor-Prot[eacute]g[eacute] Agreement. Failure to do so shall result in cancellation of the Agreement.

#### 819.7107 Selection of Prot[eacute]g[eacute] firms.

(a) Mentor firms will be solely responsible for selecting prot[eacute]g[eacute] firms. Mentors are encouraged to select from a broad base of SDVOSB or VOSB firms whose core competencies support VA's mission; and choose SDVOSB and/or VOSB prot[eacute]g[eacute]s in addition to firms with whom they have established business relationships.

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(b) Mentors may have multiple prot[eacute]g[eacute]s. However, to preserve the integrity of the Program and assure the quality of developmental assistance provided to prot[eacute]g[eacute]s, VA reserves the right to limit the total number of prot[eacute]g[eacute]s participating under each mentor firm for the Mentor-Prot[eacute]g[eacute] Program.

(c) The selection of prot[eacute]g[eacute] firms by mentor firms may not be protested, except that any protest regarding the size or eligibility status of an entity selected by a mentor shall be handled in accordance with the FAR and SBA regulations.

#### 819.7108 Application process.

(a) Firms interested in becoming approved mentor-prot[eacute]g[eacute] participants must submit a joint written VA Mentor-Prot[eacute]g[eacute] Agreement to the VA OSDBU for review and approval. The proposed Mentor-Prot[eacute]g[eacute] Agreement will be evaluated on the extent to which the mentor plans to provide developmental assistance. Evaluations will consider the nature and extent of technical and managerial support as well as any proposed financial assistance in the form of equity investment, loans, joint-venture, and traditional subcontracting support.

(b) The Mentor-Prot[eacute]g[eacute] Agreement must contain:

(1) Names, addresses, phone numbers, and e-mail addresses (if available) of the mentor and prot[eacute]g[eacute] firm(s) and a point of contact for both mentor and prot[eacute]g[eacute] who will oversee the agreement;

(2) A statement from the prot[eacute]g[eacute] firm that the firm is currently eligible as a SDVOSB or VOSB to participate in VA's Mentor-Prot[eacute]g[eacute] Program;

(3) A description of the mentor's ability to provide developmental assistance to the prot[eacute]g[eacute] and the type of developmental assistance that will be provided, to include a description of the types and dollar amounts of subcontract work, if any, that may be awarded to the prot[eacute]g[eacute] firm;

(4) Duration of the Agreement, including rights and responsibilities of both parties (mentor and prot[eacute]g[eacute]), with bi-annual reviews;

(5) Termination procedures, including procedures for the parties' voluntary withdrawal from the Program. The Agreement shall require the mentor or the prot[ecute]g[ecute] to notify the other firm and VA OSDBU in writing at least 30 days in advance of its intent to voluntarily terminate the Agreement;

(6) A schedule with milestones for providing assistance;

(7) Criteria for evaluation of the prot[ecute]g[ecute]'s developmental success;

(8) A plan addressing how the mentor will increase the quality of the prot[ecute]g[ecute] firm's technical capabilities and contracting and subcontracting opportunities;

(9) An estimate of the total cost of the planned mentoring assistance to be provided to the Prot[ecute]g[ecute];

(10) An agreement by both parties to comply with the reporting requirements of 819.7113;

(11) A plan for accomplishing unfinished work should the Agreement be voluntarily cancelled;

(12) Other terms and conditions, as appropriate; and

(13) Signatures and date(s).

(c) The Agreement defines the relationship between the mentor and the prot[ecute]g[ecute] firms only. The Agreement does not create any privity of contract between the mentor and VA or the prot[ecute]g[ecute] and VA.

#### 819.7109 VA review of application.

(a) VA OSDBU will review the information to establish the mentor and prot[ecute]g[ecute] eligibility and to ensure that the information that is in VAAR 819.7108 is included. If the application relates to a specific contract, then OSDBU will consult with the responsible contracting officer on the adequacy of the proposed Agreement, as appropriate. OSDBU will complete its review no later than 30 calendar days after receipt of the application or after consultation with the contracting officer, whichever is later. There is no charge to apply for the Mentor-Prot[ecute]g[ecute] Program.

(b) After OSDBU completes its review and provides written approval, the mentor may execute the Agreement and implement the developmental assistance as provided under the Agreement. OSDBU will post a copy of the Mentor-Prot[ecute]g[ecute] Agreements to a VA Web site to be accessible to VA contracting officers for review for any VA contracts affected by the Agreement.

(c) If the application is disapproved, the mentor may provide additional information for reconsideration. OSDBU will complete review of any supplemental material no later than 30 days after its receipt. Upon finding deficiencies that VA considers correctable, OSDBU will notify the mentor and prot[ecute]g[ecute] and request correction of deficiencies to be provided within 15 days.

#### 819.7110 Developmental assistance.

The forms of developmental assistance a mentor can provide to a prot[ecute]g[ecute] include, but are not limited to, the following:

(a) Guidance relating to--

- (1) Financial management;
  - (2) Organizational management;
  - (3) Overall business management/planning;
  - (4) Business development; and
  - (5) Technical assistance.
- (b) Loans.
  - (c) Rent-free use of facilities and/or equipment.
  - (d) Property.
  - (e) Temporary assignment of personnel to a Prot[acute]g[acute] for training.
  - (f) Any other types of permissible, mutually beneficial assistance.

#### 819.7111 Obligations under the Mentor-Prot[acute]g[acute] Program.

(a) A mentor or prot[acute]g[acute] may voluntarily withdraw from the Program. However, in no event shall such withdrawal impact the contractual requirements under any prime contract with VA.

(b) Mentors and prot[acute]g[acute]s shall submit reports to VA OSDBU in accordance with 819.7113.

#### 819.7112 Internal controls.

(a) OSDBU will oversee the Program and will work cooperatively with relevant contracting officers to achieve Program objectives. OSDBU will establish internal controls as checks and balances applicable to the Program. These controls will include:

- (1) Reviewing and evaluating mentor applications for validity of the provided information;
- (2) Reviewing bi-annual progress reports submitted by mentors and prot[acute]g[acute]s on prot[acute]g[acute] development to measure prot[acute]g[acute] progress against the plan submitted in the approved Agreement;
- (3) Reviewing and evaluating financial reports and invoices submitted by the mentor to verify that VA is not charged by the mentor for providing developmental assistance to the prot[acute]g[acute]; and
- (4) Limiting the number of participants in the Mentor-Prot[acute]g[acute] Program within a reporting period, in order to insure the effective management of the Program.

(b) VA may rescind approval of an existing Mentor-Prot[acute]g[acute] Agreement if it determines that such action is in VA's best interest. The rescission shall be in writing and sent to the mentor and prot[acute]g[acute] after approval by the OSDBU Director. Rescission of an Agreement does not change the terms of any subcontract between the mentor and the prot[acute]g[acute].

#### 819.7113 Reports.

(a) Mentor and prot[acute]g[acute] entities shall submit to VA's OSDBU bi-annual reports on progress under the Mentor-

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Prot[eacute]g[eacute] Agreement. VA will evaluate reports by considering the following:

(1) Specific actions taken by the mentor during the evaluation period to increase the participation of their prot[eacute]g[eacute](s) as suppliers to VA, other government agencies and to commercial entities;

(2) Specific actions taken by the mentor during the evaluation period to develop technical and administrative expertise of a prot[eacute]g[eacute] as defined in the Agreement;

(3) The extent to which the prot[eacute]g[eacute] has met the developmental objectives in the Agreement;

(4) The extent to which the mentor's participation in the Mentor-Prot[eacute]g[eacute] Program impacted the prot[eacute]g[eacute]'(s) ability to receive contract(s) and subcontract(s) from private firms and federal agencies other than VA; and, if deemed necessary;

(5) Input from the prot[eacute]g[eacute] on the nature of the developmental assistance provided by the mentor.

(b) OSDBU will submit annual reports to the relevant contracting officer regarding participating prime contractor(s)' performance in the Program.

(c) In addition to the written progress report in paragraph (a) of this section, at the mid-term point in the Mentor-Prot[eacute]g[eacute] Agreement, the mentor and the prot[eacute]g[eacute] shall formally brief the VA OSDBU regarding program accomplishments as pertains to the approved agreement.

(d) Mentor and prot[eacute]g[eacute] firms shall submit an evaluation to OSDBU at the conclusion of the mutually agreed upon Program period, the conclusion of the contract, or the voluntary withdrawal by either party from the Program, whichever comes first.

#### 819.7114 Measurement of program success.

The overall success of the VA Mentor-Prot[eacute]g[eacute] Program encompassing all participating mentors and prot[eacute]g[eacute]s will be measured by the extent to which it results in:

(a) An increase in the quality of the technical capabilities of the prot[eacute]g[eacute] firm.

(b) An increase in the number and dollar value of contract and subcontract awards to prot[eacute]g[eacute] firms since the time of their entry into the program attributable to the mentor-prot[eacute]g[eacute] relationship (under VA contracts, contracts awarded by other Federal agencies and under commercial contracts.)

#### 819.7115 Solicitation provisions.

(a) Insert 852.219-71, VA Mentor-Prot[eacute]g[eacute] Program, in solicitations that include FAR clause 52.219-9, Small Business Subcontracting Plan.

(b) Insert 852.219-72, Evaluation Factor for Participation in the VA Mentor-Prot[eacute]g[eacute] Program, in solicitations that include an evaluation factor for participation in VA's Mentor-Prot[eacute]g[eacute] Program in accordance with 819.7105 and that also

include FAR clause 52.219-9, Small Business Subcontracting Plan.

#### PART 828--BONDS AND INSURANCE

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30. The authority citation for part 828 is revised to read as follows:

Authority: 38 U.S.C. 501, 8127, 8128 and 8151-8153; 40 U.S.C. 121(c); and 48 CFR 1.301-1.304.

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31. Add section 828.106-71 to read as follows:

828.106-71 Assisting service-disabled veteran-owned and veteran-owned small businesses in obtaining bonding.

VA prime contractors are encouraged to assist SDVOSB concerns and VOSB concerns in obtaining subcontractor performance and payment bonds. Mentors are especially encouraged to assist their protégés in obtaining bid, payment, and performance bonds as prime contractors and bonds as subcontractors when bonds are required.

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32. Add section 828.106-72 to read as follows:

828.106-72 Contract provision.

Insert 852.228-72, Assisting Service-Disabled Veteran-Owned and Veteran-Owned Small Businesses in Obtaining Bonds, in solicitations that include FAR clause 52.228-1, Bid Guarantee.

#### PART 852--SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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33. The authority citation for part 852 is revised to read as follows:

Authority: 38 U.S.C. 501, 8127, 8128, and 8151-8153; 40 U.S.C. 121(c); and 48 CFR 1.301-1.304.

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34. Add section 852.215-70 to read as follows:

852.215-70 Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors.

As prescribed in 815.304-71(a), insert the following clause:

Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors

(DEC2009)

(a) In an effort to achieve socioeconomic small business goals, depending on the evaluation factors included in the solicitation, VA shall evaluate offerors based on their service-disabled veteran-owned or veteran-owned small business status and their proposed use of eligible service-disabled veteran-owned small businesses and veteran-owned small businesses as subcontractors.

(b) Eligible service-disabled veteran-owned offerors will receive full credit, and offerors qualifying as veteran-owned small businesses will receive partial credit for the Service-Disabled Veteran-Owned and Veteran-owned Small Business Status evaluation factor. To receive credit, an offeror must be registered and verified in Vendor Information Pages (VIP) database. (<http://www.VetBiz.gov>).

(c) Non-veteran offerors proposing to use service-disabled veteran-owned small businesses or veteran-owned small businesses as subcontractors will receive some consideration under this evaluation factor. Offerors must state in their proposals the names of the SDVOSBs and VOSBs with whom they intend to subcontract and provide a brief description of the proposed subcontracts and the approximate dollar values of the proposed subcontracts. In addition, the proposed subcontractors must be registered and verified in the VetBiz.gov VIP database (<http://www.vetbiz.gov>).

(End of Clause)

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35. Add section 852.215-71 to read as follows:

852.215-71 Evaluation Factor Commitments.

As prescribed in 815.304-71(b), insert the following clause:

Evaluation Factor Commitments

(Dec2009)

The offeror agrees, if awarded a contract, to use the service-disabled veteran-owned small businesses or veteran-owned small businesses proposed as subcontractors in accordance with 852.215-70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors, or to substitute one or more service-disabled veteran-owned small businesses or veteran-owned small businesses for subcontract work of the same or similar value.

(End of Clause)

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36. Add section 852.219-9 to read as follows:

852.219-9 VA Small Business Subcontracting Plan Minimum Requirements.

As prescribed in subpart 819.709, insert the following clause:

VA Small Business Subcontracting Plan Minimum Requirements

(DEC2009)

(a) This clause does not apply to small business concerns.

(b) If the offeror is required to submit an individual subcontracting plan, the minimum goals for award of subcontracts to service-disabled veteran-owned small business concerns and veteran-owned small business concerns shall be at least

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commensurate with the Department's annual service-disabled veteran-owned small business and veteran-owned small business prime contracting goals for the total dollars planned to be subcontracted.

(c) For a commercial plan, the minimum goals for award of subcontracts to service-disabled veteran-owned small business concerns and veteran-owned small businesses shall be at least commensurate with the Department's annual service-disabled veteran-owned small business and veteran-owned small business prime contracting goals for the total value of projected subcontracts to support the sales for the commercial plan.

(d) To be credited toward goal achievements, businesses must be verified as eligible in the Vendor Information Pages database. The contractor shall annually submit a listing of service-disabled veteran-owned small businesses and veteran-owned small businesses for which credit toward goal achievement is to be applied for the review of personnel in the Office of Small and Disadvantaged Business Utilization.

(e) The contractor may appeal any businesses determined not eligible for crediting toward goal achievements by following the procedures contained in 819.407.

(End of Clause)

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37. Add section 852.219-10 to read as follows:

852.219-10 VA Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside.

As prescribed in 819.7009, insert the following clause:

VA Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside

(DEC2009)

(a) Definition. For the Department of Veterans Affairs, ``Service-disabled veteran-owned small business concern':

(1) Means a small business concern:

(i) Not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans (or eligible surviving spouses);

(ii) The management and daily business operations of which are controlled by one or more service-disabled veterans (or eligible surviving spouses) or, in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran;

(iii) The business meets Federal small business size standards for the applicable North American Industry Classification System (NAICS) code identified in the solicitation document; and

(iv) The business has been verified for ownership and control and is so listed in the Vendor Information Pages database, (<http://www.VetBiz.gov>).

(2) ``Service-disabled veteran'' means a veteran, as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16).

(b) General. (1) Offers are solicited only from service-disabled veteran-owned small business concerns. Offers received from concerns that are not service-disabled veteran-owned small business concerns shall not be considered.

(2) Any award resulting from this solicitation shall be made to a service-disabled veteran-owned small business concern.

(c) Agreement. A service-disabled veteran-owned small business concern agrees that in the performance of the contract, in the case of a contract for:

(1) Services (except construction), at least 50 percent of the cost of personnel for contract performance will be spent for employees of the concern or employees of other eligible service-disabled veteran-owned small business concerns;

(2) Supplies (other than acquisition from a nonmanufacturer of the supplies), at least 50 percent of the cost of manufacturing, excluding the cost of materials, will be performed by the concern or other eligible service-disabled veteran-owned small business concerns;

(3) General construction, at least 15 percent of the cost of the contract performance incurred for personnel will be spent on the concern's employees or the employees of other eligible service-disabled veteran-owned small business concerns; or

(4) Construction by special trade contractors, at least 25 percent of the cost of the contract performance incurred for personnel will be spent on the concern's employees or the employees of other eligible service-disabled veteran-owned small business concerns.

(d) A joint venture may be considered a service-disabled veteran owned small business concern if--

(1) At least one member of the joint venture is a service-disabled veteran-owned small business concern, and makes the following representations: That it is a service-disabled veteran-owned small business concern, and that it is a small business concern under the North American Industry Classification Systems (NAICS) code assigned to the procurement;

(2) Each other concern is small under the size standard

corresponding to the NAICS code assigned to the procurement; and

(3) The joint venture meets the requirements of paragraph 7 of the explanation of Affiliates in 19.101 of the Federal Acquisition Regulation.

(4) The joint venture meets the requirements of 13 CFR 125.15(b).

(e) Any service-disabled veteran-owned small business concern (non-manufacturer) must meet the requirements in 19.102(f) of the Federal Acquisition Regulation to receive a benefit under this program.

(End of Clause)

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38. Add section 852.219-11 to read as follows:

852.219-11 VA Notice of Total Veteran-Owned Small Business Set-Aside.

As prescribed in 819.7009, insert the following clause:

VA Notice of Total Veteran-Owned Small Business Set-Aside

(DEC2009)

(a) Definition. For the Department of Veterans Affairs, ``Veteran-owned small business concern''--

(1) Means a small business concern--

(i) Not less than 51 percent of which is owned by one or more veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans;

(ii) The management and daily business operations of which are controlled by one or more veterans;

(iii) The business meets Federal small business size standards for the applicable North American Industry Classification System (NAICS) code identified in the solicitation document; and

(iv) The business has been verified for ownership and control and is so listed in the Vendor Information Pages database, (<http://www.VetBiz.gov>).

(2) ``Veteran'' is defined in 38 U.S.C. 101(2).

(b) General. (1) Offers are solicited only from veteran-owned small business concerns. All service-disabled veteran-owned small businesses are also determined to be veteran-owned small businesses if they meet the criteria identified in paragraph (a)(1) of this section. Offers received from concerns that are not veteran-owned small business concerns shall not be considered.

(2) Any award resulting from this solicitation shall be made to a veteran-owned small business concern.

(c) Agreement. A veteran-owned small business concern agrees that in the performance of the contract, in the case of a contract for--

(1) Services (except construction), at least 50 percent of the cost of personnel for contract performance will be spent for employees of the concern or employees of other eligible veteran-

owned small business concerns;

(2) Supplies (other than acquisition from a non-manufacturer of the supplies), at least 50 percent of the cost of manufacturing, excluding the cost of materials, will be performed by the concern or other eligible veteran-owned small business concerns;

(3) General construction, at least 15 percent of the cost of the contract performance incurred for personnel will be spent on the concern's employees or the employees of other eligible veteran-owned small business concerns; or

(4) Construction by special trade contractors, at least 25 percent of the cost of the contract performance incurred for personnel will be spent on the concern's employees or the employees of other eligible veteran-owned small business concerns.

(d) A joint venture may be considered a veteran-owned small business concern if:

(1) At least one member of the joint venture is a veteran-owned small business concern, and makes the following representations: That it is a veteran-owned small business concern, and that it is a small business concern under the NAICS code assigned to the procurement;

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(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement;

(3) The joint venture meets the requirements of paragraph 7 of the explanation of Affiliates in 19.101 of the Federal Acquisition Regulation; and

(4) The joint venture meets the requirements of 13 CFR 125.15(b), except that the principal company may be a veteran-owned small business concern or a service-disabled veteran-owned small business concern.

(e) Any veteran-owned small business concern (non-manufacturer) must meet the requirements in 19.102(f) of the Federal Acquisition Regulation to receive a benefit under this program.

(End of Clause)

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39. Add section 852.219-71 to read as follows:

852.219-71 VA Mentor-Prot[acute]g[acute] Program.

As prescribed in 819.7115(a), insert the following clause:

VA Mentor-Prot[acute]g[acute] Program

(DEC2009)

(a) Large businesses are encouraged to participate in the VA Mentor-Prot[acute]g[acute] Program for the purpose of providing developmental assistance to eligible service-disabled veteran-owned small businesses and veteran-owned small businesses to enhance the small businesses' capabilities and increase their participation as

VA prime contractors and as subcontractors.

(b) The program consists of:

(1) Mentor firms, which are contractors capable of providing developmental assistance;

(2) Prot[eacute]g[eacute] firms, which are service-disabled veteran-owned small business concerns or veteran-owned small business concerns; and

(3) Mentor-Prot[eacute]g[eacute] Agreements approved by the VA Office of Small and Disadvantaged Business Utilization.

(c) Mentor participation in the program means providing business developmental assistance to aid prot[eacute]g[eacute]s in developing the requisite expertise to effectively compete for and successfully perform VA prime contracts and subcontracts.

(d) Large business prime contractors serving as mentors in the VA Mentor-Prot[eacute]g[eacute] Program are eligible for an incentive for subcontracting plan credit. VA will recognize the costs incurred by a mentor firm in providing assistance to a prot[eacute]g[eacute] firm and apply those costs for purposes of determining whether the mentor firm attains its subcontracting plan participation goals under a VA contract. The amount of credit given to a mentor firm for these prot[eacute]g[eacute] developmental assistance costs shall be calculated on a dollar-for-dollar basis and reported by the large business prime contractor via the Electronic Subcontracting Reporting System (eSRS).

(e) Contractors interested in participating in the program are encouraged to contact the VA Office of Small and Disadvantaged Business Utilization for more information.

(End of Clause)

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40. Add section 852.219-72 to read as follows:

852.219-72 Evaluation Factor for Participation in the VA Mentor-Prot[eacute]g[eacute] Program.

As prescribed in 819.7115(b), insert the following clause:

Evaluation Factor for Participation in the VA Mentor-Prot[eacute]g[eacute] Program

(DEC2009)

This solicitation contains an evaluation factor or sub-factor regarding participation in the VA Mentor-Prot[eacute]g[eacute] Program. In order to receive credit under the evaluation factor or sub-factor, the offeror must provide with its proposal a copy of a signed letter issued by the VA Office of Small and Disadvantaged Business Utilization approving the offeror's Mentor-Prot[eacute]g[eacute] Agreement.

(End of Clause)

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41. Add section 852.228-72 to read as follows:

852.228-72 Assisting Service-Disabled Veteran-Owned and Veteran-Owned Small Businesses in Obtaining Bonds.

As prescribed in 828.106-71, insert the following clause:

Assisting Service-Disabled Veteran-Owned Small Businesses and Veteran-Owned Small Businesses in Obtaining Bonds

(DEC2009)

Prime contractors are encouraged to assist service-disabled veteran-owned and veteran-owned small business potential subcontractors in obtaining bonding, when required. Mentor firms are encouraged to assist prot[eacute]g[eacute] firms under VA's Mentor-Prot[eacute]g[eacute] Program in obtaining acceptable bid, payment, and performance bonds, when required, as a prime contractor under a solicitation or contract and in obtaining any required bonds under subcontracts.

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