

Congress of the United States  
U.S. House of Representatives  
Committee on Small Business  
2361 Rayburn House Office Building  
Washington, DC 20515-0515

**Memorandum**

To: Members, Subcommittee on Oversight, Investigations, and Regulations  
From: Committee Staff  
Date: Monday, June 4, 2018  
Re: Hearing: Vets First? An Examination of VA's Resources for Veteran-Owned Small Businesses

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On Thursday, June 7, 2018 at 2:00 p.m., the Committee on Small Business Subcommittee on Investigations, Oversight, and Regulations will meet in Room 2360 of the Rayburn House Office Building for the purpose of examining the resources for veteran-owned and service-disabled veteran-owned small businesses at the United States Department of Veterans Affairs (VA). Specifically, Members will consider the Veterans First Contracting Program and recently proposed changes for procuring medical supplies.

**I. Introduction**

Our nation's heroes make up a significant percentage of the American workforce. The Department of Labor's Bureau of Labor Statistics (BLS) reported that as of April 2018, there were nearly 9.5 million veterans in the civilian labor force.<sup>1</sup> Of those veterans, approximately 9.2 million were employed and about 351,000 were unemployed.<sup>2</sup> However, veterans also had a lower labor force participation rate than nonveterans aged 18 and older, at 49.7 percent and 65.4 percent, respectively.<sup>3</sup> This means that, overall, more nonveterans above the age of 18 are available for work or are seeking employment more actively than veterans. A recent report from the Council of Economic Advisers and the National Economic Council attributed this to a number of possible factors, including potential employers' difficulty in understanding a military resume, the presence of a service-connected disability, and the increasing population of post-9/11 veterans who have been diagnosed with post-traumatic stress disorder.<sup>4</sup> In order to reverse the

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<sup>1</sup> The civilian labor force refers to those either employed, unemployed, or available for work, except for temporary illness, and had made specific efforts to find employment sometime during the four-week period ending with the reference week. *Table A-5. Employment Status of the Civilian Population 18 Years and Over by Veteran Status, Period of Service, and Sex, Not Seasonally Adjusted*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, <https://www.bls.gov/news.release/empsit.t05.htm> (last modified May 4, 2018).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* The labor force participation rate refers to the percentage of available workforce that is employed or actively seeking employment.

<sup>4</sup> EXEC. OFFICE OF THE PRESIDENT, *MILITARY SKILLS FOR AMERICA'S FUTURE: LEVERAGING MILITARY SERVICE AND EXPERIENCE TO PUT VETERANS AND MILITARY SPOUSES BACK TO WORK* (May 2012), [https://obamawhitehouse.archives.gov/sites/default/files/docs/veterans\\_report\\_5-31-2012.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/veterans_report_5-31-2012.pdf).

trend of the declining labor force participation rate among the veteran population, it is important to examine whether the existing resources available to veterans, specifically at the federal level, are working to achieve their intended goals.

## **II. Veterans First Contracting Program**

The VA has many tools at its disposal to ensure that veteran-owned small businesses (VOSBs) and service-disabled veteran-owned small businesses (SDVOSBs) are able to succeed in the American economy. One of these tools is the Veterans First Contracting Program (Vets First), which was created by Congress in the Veterans Benefits, Health Care, and Information Technology Act of 2006 (Vets First Act).<sup>5</sup> The Vets First program was designed to maximize the participation of VOSBs and SDVOSBs in the federal marketplace by providing the VA with contracting flexibilities for veteran small businesses to assist them in doing business with the VA.

One of the authorities granted to the VA through the Vets First Act is the ability to make direct, sole source awards to VOSBs and SDVOSBs when three conditions are met: 1) the firm is a responsible source; 2) the contract award exceeds \$150,000 but does not exceed \$5 million; and 3) the award can be made at a fair and reasonable price.<sup>6</sup> Therefore, unlike any other federal agency, the VA can bypass the “rule of two” when making federal awards to a veteran-owned firm.<sup>7</sup> In other words, the VA does not need reasonable expectation that two or more VOSBs or SDVOSBs will submit offers for a contract, but simply requires that the firm is a responsible source and that the award can be made at a fair and reasonable price.<sup>8</sup> The VA was also granted the authority to use “other than competitive procedures”<sup>9</sup> when awarding contracts under the simplified acquisition threshold, which currently stands at \$150,000, to small businesses owned and controlled by veterans.<sup>10</sup>

While Vets First was in theory designed to assist the veteran small business community, the VA has not consistently carried out the intentions of Congress in practice. Rather than using the law to increase VOSB and SDVOSB participation, the VA has attempted to restrict its own sole source authority by adopting rules and policies that increase barriers to its use nearly from the start. Following the law’s enactment, the VA issued VA Acquisition Regulation (VAAR)

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<sup>5</sup> Pub. L. No. 109-461, § 502, 120 STAT. 3403, 3431-35.

<sup>6</sup> 38 U.S.C. § 8127(c).

<sup>7</sup> The rule of two is the process prescribed in 38 U.S.C. 8127(d) whereby a contracting officer of the VA, “shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.”

<sup>8</sup> *Supra*, note 6.

<sup>9</sup> 10 U.S.C. 2304 and 41 U.S.C. 3301 require that “contracting officers shall provide for full and open competition through use of the competitive procedure(s) contained in this subpart that are best suited to the circumstances of the contract action and consistent with the need to fulfill the Government’s requirements efficiently.” However, certain circumstances provided in Federal Acquisition Regulations 6.302 and 6.303 permit contracting without providing for full and open competition.

<sup>10</sup> *Id.* § 8127(b).

819.7007 to implement sole source authority for SDVOSBs and VAAR 819.7008 for VOSBs.<sup>11</sup> These regulations echoed the language included in the Vets First Act, but added one additional requirement for contracting officers exercising sole source authority: a written synopsis in accordance with Federal Acquisition Regulation Part 5.<sup>12</sup> This requirement created an additional burden for contracting officers who were now required to publicize contract opportunities and award information before the contract was awarded, even though this language was not included in the Vets First Act.

The VA has further complicated the process for contracting officers through a number of internal actions. The most recent stems from a July 2016 revision of the VAAR<sup>13</sup> as a result of the Supreme Court's decision in *Kingdomware Technologies, Inc. v. United States*.<sup>14</sup> The Supreme Court upheld Vets First, specifically as it applies to the Federal Supply Schedule program.<sup>15</sup> However, shortly after the case was decided, the VA amended the VAAR to require that sole source awards must be accompanied by a "written justification and approval" in order to be considered.<sup>16</sup> Additionally, contracting officers must obtain approval from multiple levels above the contracting officer prior to awarding the sole source contracts.<sup>17</sup> These additional requirements discouraged contracting officers from using their sole source authority, therefore harming veteran-owned and service-disabled veteran owned small businesses that may have been eligible for sole source contracts. It is important to note that these revisions went into effect without the proper notice and comment rulemaking procedures. While *Kingdomware* in many ways served to provide more contracting opportunities for SDVOSBs and VOSBs, the VA's actions as a result instead placed burdensome requirements on contracting officers to implement them.

In addition to changes in the VAAR, the VA has implemented internal policies that have created additional requirements for contracting officers in the wake of *Kingdomware*. VA's Policy Memorandum 2016-05, issued in accordance with the revisions to the VAAR in July 2016, states that contracting officers wishing to make a sole source award "shall document this decision on VA Form 2268 and submit it with supporting documentation."<sup>18</sup> VA Form 2268 requires contracting officers to provide: 1) a market research report and all supporting

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<sup>11</sup> VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses, 74 Fed. Reg. 64, 619, 64, 632 (proposed Dec. 8, 2009) (to be codified at 48 C.F.R. pts. 802, 804, 808, 809, 810, 813, 815, 817, 819, 828, and 852).

<sup>12</sup> *Id.*

<sup>13</sup> U.S. DEPT. OF VETERANS AFFAIRS, VA ACQUISITION UPDATE NO. 2008-03 (Aug, 29, 2017), available at [https://www.va.gov/oal/docs/library/vaau/vaau2008-03\\_LooseleafUpdate.pdf](https://www.va.gov/oal/docs/library/vaau/vaau2008-03_LooseleafUpdate.pdf) [hereinafter 2017 Update].

<sup>14</sup> *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016).

<sup>15</sup> *Id.*

<sup>16</sup> 48 C.F.R. § 819.7007(c); 48 C.F.R. § 819.7008(c).

<sup>17</sup> VAAR 819.7007 and VAAR 819.7008 state that "a determination that only one SDVOSB can meet the requirement is not required. However, in accordance with FAR 6.302-5(c)(2)(ii), contracts awarded using this authority shall be supported by a written justification and approval described in FAR 6.303 and 6.304, as applicable." FAR 6.304 provides that the contracting officer must receive the approval of the advocate for competition by the procuring activity designated pursuant to FAR 605.1, the head of the procuring activity, or the senior procurement executive of the agency prior to making an award.

<sup>18</sup> U.S. DEP'T OF VET. AFFAIRS, VA PROCUREMENT POLICY MEMORANDUM (2016-05), IMPLEMENTATION OF THE VETERANS FIRST CONTRACTING PROGRAM AS A RESULT OF THE U.S. SUPREME COURT DECISION (2016), available at <https://www.va.gov/oal/docs/business/pps/ppm201605.pdf>.

documentation; 2) an Acquisition Plan (if required); 3) a Statement of Work or other appropriate work description; and 4) Independent Government Cost Estimate.<sup>19</sup> These additional requirements, both through regulation and internal guidance, are not mandated by statute and add further requirements for contracting officers, potentially delaying or preventing many SDVOSB and VOSB sole source procurements authorized by Congress.

### III. A Case Study: The Medical Surgical Prime Vendor – Next Generation

As has been shown, although the VA has a unique sole source authority to contract with VOSBs and SDVOSBs, this benefit is not always utilized to its full potential. The VA's Medical Surgical Prime Vendor – Next Generation (MSPV-NG) Program provides a key example of how policies affect action. In December 2016, the VA launched MSPV-NG as the mandatory vehicle for procuring medical supplies for all VA medical centers.<sup>20</sup> Through this program, medical supplies are procured to meet the needs of approximately 7 million veterans.<sup>21</sup> MSPV-NG was established to procure a heavy volume of medical supplies through a “distribution” contract. Under this structure, the VA identifies and awards blanket purchase agreements (BPAs) to a product or service supplier, and through the BPAs, prime vendors are authorized to enter into distribution agreements with the suppliers.<sup>22</sup> Many of these suppliers are VOSBs and SDVOSBs. The prime vendors then distribute the supplies to the VA medical facilities.<sup>23</sup>

However, opportunities for these firms to compete for MSPV-NG contracts have slowly been in decline.<sup>24</sup> A recent example of this can be found in a Class Justification and Approval for Other than Full and Open Competition (J&A) filed by the VA on April 12, 2018.<sup>25</sup> The J&A proposes a change to the procurement structure of the MSPV-NG program in which four prime vendors<sup>26</sup> would change from “distribution” contracts to “distribution and supply” contracts.<sup>27</sup> As a result, the VA will no longer have contractual agreements, or BPAs, with the suppliers; rather, the prime vendors will enter into subcontracts with the suppliers.

Under this “distribution and supply” structure, many SDVOSB and VOSB suppliers that had previously been under contract with the VA can no longer benefit from the applicability of

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<sup>19</sup> U.S. DEP'T OF VET. AFFAIRS, FY 2016 SMALL BUSINESS PROCUREMENT REVIEW PROGRAM POLICY (2016), available at <https://www.va.gov/osdbu/docs/FY-2016-SB-PRP-Policy-Memo-Revised-VOSB-062216.pdf>.

<sup>20</sup> MSPV-NG was an update to the original MSVP program at VA. MEDICAL/SURGICAL PRIME VENDOR – NEXT GENERATION PROGRAM, U.S. DEP'T OF VET. AFFAIRS, available at <https://www.va.gov/opal/sac/mspvNG.asp> (last visited May 24, 2018).

<sup>21</sup> *Id.*

<sup>22</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 18-274T, VETERANS AFFAIRS CONTRACTING: IMPROVEMENTS IN BUYING MEDICAL AND SURGICAL SUPPLIES COULD YIELD COST SAVINGS AND EFFICIENCY (2017).

<sup>23</sup> *Id.*

<sup>24</sup> U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, VETERAN-OWNED BUSINESSES AND THEIR OWNERS, DATA FROM THE U.S. CENSUS BUREAU'S SURVEY OF BUSINESS OWNERS (Apr. 2017), available at <https://www.sba.gov/sites/default/files/advocacy/435-veteran-owned-businesses-report.pdf>.

<sup>25</sup> U.S. DEPT. OF VET. AFFAIRS, CLASS JUSTIFICATION AND APPROVAL FOR OTHER THAN FULL AND OPEN COMPETITION (Apr. 12, 2018), available at [https://www.fbo.gov/index?s=opportunity&mode=form&id=1713a65a03251f6b5fc3c2bd68212905&tab=core&\\_cvi\\_ew=0](https://www.fbo.gov/index?s=opportunity&mode=form&id=1713a65a03251f6b5fc3c2bd68212905&tab=core&_cvi_ew=0).

<sup>26</sup> The vendors included are Kreislers, Inc; American Medical Depot; Cardinal Health 200, Inc.; and Medline Industries, Inc.

<sup>27</sup> U.S. SMALL BUS. ADMIN OFFICE OF ADVOCACY, *supra* note 22.

the Vets First mandate, as the sole source authority granted by Vets First applies only to prime contracts, and not subcontracting opportunities.<sup>28</sup> Instead, the VA has proposed inclusion for SDVOSBs and VOSBs at the subcontracting level only.<sup>29</sup> This is problematic because for years, the VA's subcontracting performance has fallen below the goals set by the agency. In fact, despite setting a modest 3 percent goal for subcontracting to SDVOSBs each year, the VA has failed to reach this goal every year since Fiscal Year 2014.<sup>30</sup> If the VA does fail to include SDVOSBs and VOSBs at the subcontracting level under its newly proposed structure for MSPV-NG, it will have detrimental effects on the veteran-owned businesses who rely on federal agencies such as the VA for work.

#### **IV. Conclusion**

The VA's Veterans First Contracting Program was established by Congress to serve as a logical extension of the agency's mission to assist our nation's veterans and provide for a seamless transition back into civilian life. Not only can the VA use this authority to assist the veterans who own and control these businesses, but also the veterans who are often employed by VOSBs and SDVOSBs. However, the VA has continuously skirted this authority and has failed to see the value added by veteran small businesses. The restructuring of the MSPV-NG program is another example of just that. This hearing will allow Subcommittee Members the opportunity to learn more about the benefits of contracting with veteran small businesses and the detrimental effects this restructuring could have on the veteran small business community.

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<sup>28</sup> Pub. L. No. 109-461 § 8172, 120 STAT. 3403, 3432.

<sup>29</sup> U.S. SMALL BUS. ADMIN OFFICE OF ADVOCACY, *supra* note 22, at 11-12.

<sup>30</sup> U.S. SMALL BUS. ADMIN, FY2016 SCORECARD SUMMARY (Mar. 14, 2017), *available at* [https://www.sba.gov/sites/default/files/2018-02/FY16\\_SB\\_Procurement\\_Scorecard\\_Summary\\_Final.pdf](https://www.sba.gov/sites/default/files/2018-02/FY16_SB_Procurement_Scorecard_Summary_Final.pdf).