

**STATEMENT OF
DAVY LEGHORN, ASSISTANT DIRECTOR
NATIONAL VETERANS EMPLOYMENT AND EDUCATION DIVISION
THE AMERICAN LEGION
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
VETERANS' AFFAIRS COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES
ON**

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Chairman Pappas, Ranking Member Bergman, and distinguished members of the subcommittee; On behalf of National Commander James W. "Bill" Oxford, and the nearly 2 million members of The American Legion, we thank you for inviting The American Legion to submit our statement for the record at today's hearing. We are privileged to present our position on the Department of Veterans' Affairs (VA) response to the COVID-19 pandemic and explore where the shortages came from and share lessons learned in working with VA small business suppliers and discussing national security imperatives in maintaining American-based manufacturing.

We will discuss from a small business medical supplier's point of view where some of the shortages were coming from, where the dependencies were in the supply chain, and where the deficiencies were self-inflicted. We will also share with the subcommittee where we see VA's supply chain headed within the next 2-3 years.

Shortage Due to Lack of Flexibility in Contracting

The shortage of some emergent products was self-inflicted. A clear example demonstrating where the supply chain breakdown occurred was with disinfectant chemicals. This shortage was an instance where 100 percent of the chemicals were American-sourced and in supply. Still, some VA Medical Centers (VAMC) experienced the initial shortage because they refused to buy in larger quantities in irregular containers.

Small plastic quart bottles and spray bottles house the disinfectant chemicals for retail; while the chemicals are made in the USA, their containers are produced in China. The Coronavirus shuttered the Chinese economy long before it affected the United States. When the pandemic shut down the Chinese economy, US manufacturers continued producing disinfectant chemicals, but there was no way to package it for sale. At the time, what was available were larger capacity American-made 5-gallon pails, 55-gallon drums, and even larger capacity containers.

During the onset of the pandemic, VA refused alternative orders of larger quantities of disinfectants in irregular containers, that at best required some extra work in re-bottling. Similarly,

VA was fixated on acquiring pre-saturated disinfectant wipes, when the same product could be delivered separately in larger quantities, irregular containers with some assembly required. VAMC personnel hinted that they were not interested in acquiring irregular products over concerns that it required VA employees to do extra work. Weighing the balance of harms, in emergent times, perhaps VA should overlook some inhibitions and accept some risks to avoid shortages of critical safety supplies.

Shortage Caused by Pricing

Early in the pandemic, shortages also resulted from private sector and foreign buyers who were willing to pay more than VA's contract pricing offered to the manufacturers. Publicly traded manufacturing companies have to sell at higher prices when demand exceeds supply. While VA generally pays more for a product in normal times, their contract pricing was below what others were willing to pay during the pandemic, resulting in the agency being deprioritized.

When President Trump initiated the Defense Production Act in March, VA's small business suppliers rallied US-based manufacturers to reprioritize VA. Notably, one Service-Disabled Veteran-Owned Small Business' (SDVOSB), Operation VA Resupply¹ resulted in truckloads of paper products delivered to VAMCs at the height of the national shortage. The first shipment alone ensured half the VAMCs had two months' supply of sanitation paper products, stored locally, for immediate delivery by the prime vendors: Concordance Healthcare and Medline Industries. The production and supplies were always there for some emergent products. VA just wasn't the priority until someone made it their priority.

Shortage Due to Carriers

Some shortages also resulted from supplies not being delivered because of a slow-down in cross country truck deliveries. The initial expectations of COVID-19 death rates were so overblown that the freight companies used by VA's suppliers were adversely affected. A combination of freight employees not wanting to go to work, were sick, under quarantine or taking leave led to a devastating shortage of drivers in an industry that already reports a deficit of nearly 100,000 drivers.²

This deficit is where the supply chain broke for many American-made products that were otherwise unaffected by foreign production. Trucks with less than a load (LTL) delivery times went from 3-4 days under normal circumstances to 2-3 weeks during the pandemic's early days. As a result, VA suppliers began routing LTL deliveries through common carriers and local carriers

¹ Leghorn, D., 2020. *Operation VA Resupply*. [online] EIN Presswire. Available at: <<https://www.einpresswire.com/article/514438953/operation-va-resupply>> [Accessed 10 September 2020].

² American Trucking Associations. 2020. *ATA Releases Updated Driver Shortage Report And Forecast | American Trucking Associations*. [online] Available at: <<https://www.trucking.org/news-insights/ata-releases-updated-driver-shortage-report-and-forecast>> [Accessed 10 September 2020].

(e.g. USPS). They became a critical part of the supply chain that was used to their maximum capacity during the pandemic.

The lesson learned is the importance of common and local carriers. Ensuring that they maintain their delivery infrastructure is critical for if and when they counted on again to take the brunt of labor shortages in the freight industry.

The American Legion has spoken in favor of a strong local carrier infrastructure through the USPS before with Resolution 344 at our national convention in 2016.³ The American Legion implores Congress to maintain funding for the USPS to preserve current service standards, maintain quick mail transit times, and limit mail processing facilities' closures. The pandemic has revealed the critical and secondary role they play in backing up freight carriers.

Small Business Suppliers Worked for Free to Fulfil VA's Orders

Like the common and local carriers who have proven themselves as valuable resources during the Pandemic, VA's small business suppliers similarly had their underdog moment during the pandemic.

While a large prime vendor exited the VA supply chain due to a combination of contract mismanagement and disputes with VA during the pandemic. Our Veteran-Owned Small Business' (VOSB) and SDVOSBs suppliers remained open, worked with their prime vendors and manufacturers to reprioritize deliveries to VAMCs, and many of them are still working WITHOUT COMPENSATION to fulfill VA's orders because they know it is the right thing to do.

As a result of an unresolved dispute between VA and a prime vendor, MSPV small business suppliers have been owed millions of dollars in unpaid medical supplies that have already been delivered to the VAMCs. The American Legion expected to hear outrage among the suppliers; however, nothing can be further from the truth. All the suppliers we spoke with understood the role they play in administering healthcare to their friends, families, and fellow veterans who utilize the VAMCs. While working without compensation is not ideal, many have shifted overhead costs and continued processing VA medical supply orders because they know it is the veteran patients they are hurting when they stop.

Meanwhile, VA has made it clear that they are not legally obligated to assist their suppliers in recouping losses regardless of the dispute's outcome with the prime vendor. VA reasoned that their contractual obligations are with the prime vendor and it is the prime vendor's responsibility to pay the suppliers. However, the suppliers also entered into separate agreements with the prime vendors and VA, making it easy to contest that there is privity of contracts between suppliers and VA.

³ Archive.legion.org. 2020. *Resolution No. 344: Support Federal Legislation That Protects The Employment Of Veterans In The U.S. Postal Service Mail Processing Facilities That Are Slated For Closure*. [online] Available at: <<https://archive.legion.org/bitstream/handle/20.500.12203/5662/2016N344.pdf?sequence=1&isAllowed=y>> [Accessed 10 September 2020].

Although a contract for direct payment may not exist between the suppliers and VA, the suppliers still have legal standing to collect what they are owed directly from VA under the Tucker Act, if a breach of contract can be substantiated.⁴ Frankly, VA may be legally obligated after all, contrary to what they believe, and should at least make an effort to convince their prime vendor to pay the suppliers as a part of their dispute resolution.

VA's Perception of Small Business Suppliers

Throughout multiple administrations, VA acquisition officials have prolonged the belief that VOSBs and SDVOSBs add no value, cost more, and are burdensome to work with. VA officials have pursued policies limiting opportunities for VOSBs and SDVOSBs to work at the VA, in flagrant disregard of Public Law 109-461 and the U.S. Supreme Court decision in *Kingdomware v. United States*.

VA does not believe in paying more to support SDVOSBs. They have made it publicly known that they oppose enforcing a price differential for veteran businesses when it comes to applying the "fair and reasonable" pricing test⁵, opting to allow individual contracting officers to determine what constitutes as "fair and reasonable." The application of a "fair and reasonable" standard was meant to help veteran small businesses. However, its deliberately nebulous application is now being utilized to disqualify small businesses from VA contracts. Nowhere is this more evident than when a supplier prices a product at .05% above the cost of a non-veteran competitor, only to find that they failed to meet the threshold for "fair and reasonable" pricing to VA.

In 2018 This Subcommittee had a hearing regarding VA's attempt to abdicate their contract management responsibilities and award a single contract under MSPV 2.0 contract vehicle. The original plan would permit one company to be the singular prime vendor, singular supplier, and sole arbiter on what products made it into the products' formulary. Under VA's original scheme, VOSBs and SDVOSBs would at best become subcontractors under MSPV 2.0, thereby sidestepping the "rule of two" requirements. Congress, veterans, and industry advocates sat on this panel and agreed there were too many flaws in VA's decision and prohibited them from proceeding as planned.

In 2019 VA began then accelerated a DMLSS integration pilot program. This partnership with Defense Logistics Agency began as a feasibility study to see if VA medical supplies' procurements can integrate with the Cerner Electronic Health Record platform as DLA has already done. Before the conclusion of the DMLSS integration pilot at three VAMCs, VA has already decided to abdicate their contract management responsibilities to DOD through DLA's Distribution and Pricing Agreements (DAPA) and electronic catalogs (ECATS) over a period of 2-3 years. By having DLA run the medical-surgical supply contract, VA has effectively found another way to avoid the "rule of two" and cut VOSBs and SDVOSBs from their supply chain.

⁴ *Estes Express Lines v. United States*, 739 F.3d. 689 (Fed. Cir. 2014)

⁵ 38 U.S. Code § 8127 (d)(1)

Suppliers rely on volume to keep their businesses afloat. Without the “rule of two” imperative, VOSBs and SDVOSBs operating as suppliers in DLA’s DAPAs and ECATS won’t see the volumes as they’ve seen under MSPV 2.0. Without volume, they won’t have a business. The orders received through DLA’s supplier contracts will not support a main line of business. As a side business, the cost of federal contract regulation compliance alone will price them out of this industry.

The American Legion supports the VSOB and SDVOSB suppliers in VA's supply chains. This is why in 2019, The American Legion passed Resolution 55⁶ in support of legislation requiring mandatory use of the Veterans First Contracting Program (Vets First) on all VA contract actions, regardless of the entity that fulfills the contractual terms. Meaning that regardless of agency, if VA dollars are spent, then Vets First applies.

What do Small Businesses Bring to the Table

The American Legion will dispel the myth that small businesses add no value to the federal supply chain. Small businesses are agile and resilient. They have to be when they are a part of the federal supply chain. They are a product of the industry they are in, which caters to buyers who contractually lump their liabilities on the sellers. From the government and taxpayer perspective, this is not a bad thing. For the most part, small federal contractors understand what they are getting into and thrive in this industry. However, in the admirable strive for supply chain optimization, federal employees always forget the critical role small business suppliers play as intermediary risk absorbers.

Currently, to provide supplies to the federal government, sellers have to treat the agency as their best customer and give the lowest prices possible. They have to negotiate the price per unit with manufacturers based on expected volume, overhead expenses, and industry fees. By law, once their blanket purchasing agreement is signed with VA, they cannot sell the same product cheaper to another agency or outside source. Manufacturers and national retailers are never going to agree to these types of terms with the federal government. They need to be able to adjust pricing to respond to market demands. Manufacturers and large retailers also need to discount their supplies to gain business or clear out the surplus. The only sellers the agencies can entice with volatile fixed-price contracts are small businesses looking for a foothold in the industry.

To sell medical supplies to the federal government, a prime vendor enters in to contract with the supplier responsible for taking back products VA ordered but then stopped using. It is not uncommon for a small business to see upwards of \$15-80k of unused products being returned with no questions asked and no restocking fee or return fee reimbursements. Small businesses are willing to enter into these gratuitous terms because they are willing to pay insurance or incur these

⁶ Archive.legion.org. 2020. *Resolution No. 55: Mandatory Use Of The Veterans First Contracting Program*. [online] Available at: <<https://archive.legion.org/bitstream/handle/20.500.12203/11715/2019n055.pdf?sequence=1&isAllowed=y>> [Accessed 10 September 2020].

losses outright for a foothold in the federal procurement space. A manufacturer or large retailer with access to domestic and international buyers, and assuming they have adequate in-house counsel, are generally not going to enter into contracts that place this much risk on the sellers.

Small business suppliers also carry product liability insurance. When a federal employee or patient is injured by defective medical equipment, the supplier bears the lawsuit's brunt. The supplier's product liability insurance shields manufacturers from liability and still gives a government agency access to a manufacturer's products, who may have never wanted to be on a contract and assume the legal liabilities of selling directly to the federal government.

Small business suppliers deal with all the federal regulatory requirements to respond to solicitations and execute a contract so large retailers and manufacturers don't have to. By using a small business supplier as an intermediary, a large retailer avoids regulatory restrictions such as OFCCP reporting requirements, adhering to OFCCP hiring standards, adhering to federal accounting and audit guidelines, and obtaining federal certifications and clearances. A small business supplier with a federal agency as its main customer is highly motivated to comply with federal regulations. On-the-other-hand, A large retailer or manufacturer with access to foreign and domestic buyers has little interest in adhering to the same guidelines to sell directly to just a handful of federal customers.

Perhaps the most advantageous term the government receives in working with a small business supplier is their failsafe: Termination for Government's Convenience⁷ clause. This allows an agency to back out of an agreement without the liability of having to justify their actions. This can be done at any point throughout the duration of a contract and the government can pick and choose which part of the contract they want to keep, or they can cancel the contract in entirety. This makes selling high volumes of supplies to the government a risky business, considering an entire business line can disappear without legal redress. Needless to say, a large retailer or manufacturer would probably never enter into these types of contracts.

Made in the USA

Outsourcing manufacturing to foreign countries with low-cost labor began to undermine US national security by causing job loss, the deterioration of the middle class, and a decline in overtime. The American Legion recognizes that we live in a globalized economy, advocating for wholesale insourcing of all products and decoupling our economy from the world is not an option. However, we also need to be bluntly honest with ourselves concede that as a nation, we are reliant on foreign-sourced products for our safety and protection from the spread of COVID-19. As a nation, we must chart a course to eliminate dependencies from foreign sources for some products that have national security and strategic importance.

The American Legion believes as the VA does that America's supply chain of emergent medical and safety supplies needs to be stronger and more resilient. The COVID19 Pandemic-induced

⁷ 48 CFR § 8.406-5

product-shortages and price-gouging exposed the disadvantages of globalization and the over-reliance on foreign-sourced goods (especially from China).

The Buy American Act only requires that goods purchased by the federal government are 50% manufactured in America. A substantial amount of raw materials and components in “Made in USA” labeled goods are still sourced overseas. This must change.

The government must programmatically incentivize the domestic manufacturing of emergency supplies to prevent supply chain breakdowns in future pandemics. It is time to address this national security imperative, while the pandemic lessons are poignant. On September 7, 2020, President Trump announced that he is coming up with a plan to withhold federal contracts from companies that depend on Chinese manufacturing sources and bring manufacturing back to America by tax credits incentives and punitive tariffs.⁸

While all of this is a step in the right direction, we should also consider federal grants for small manufacturers to produce federally recognized essential products and for scientists to discover alternative products that can replace products we can't manufacture in America, such as non-woven cloth and nitro gloves which are used in medical facilities every day. 100 percent American-sourced, Trade Agreement Act compliant and manufactured products will cost more in the short term. Still, it will enable the United States to control the supply of essential products and become impervious to shortages and price gouging in the future.

The American Legion has long recognized the importance of VA's contracting vehicles that make up their medical supply chain. We recognize the need to secure that supply chain with American-sourced products to ensure that VA can provide adequate care for veteran patients in emergent times. This is why The American Legion passed Resolution 149⁹ in 2016 in support of legislation that would require the Secretary of VA to adopt a “Buy American” policy at the Department of Veteran Affairs.

CONCLUSION

Chairman Pappas, Ranking Member Bergman, and distinguished members of the subcommittee, The American Legion is thankful for the invitation to submit this statement for the record. It stands ready to assist when needed on these issues and any other issues. For additional information regarding this testimony, please contact Mr. Patrick McDonough, Legislative Associate, in The American Legion’s Legislative Division at (202) 263-2996, or pmcdonough@legion.org.

⁸ Security Today. 2020. *Federal Contracts On The Line For Outsourced Jobs -- Security Today*. [online] Available at: <<https://securitytoday.com/articles/2020/09/09/federal-contracts-on-the-line-for-outsourced-jobs.aspx?m=1>> [Accessed 10 September 2020].

⁹ Archive.legion.org. 2020. *Resolution No. 149: Support “Buy American” Policy At The Department Of Veterans Affairs To Create Jobs And Opportunities For Veterans*. [online] Available at: <<https://archive.legion.org/bitstream/handle/20.500.12203/5491/2016N149.pdf?sequence=1&isAllowed=y>> [Accessed 10 September 2020].