

# THE VOSB SUMMARY: NEWS YOU NEED TO KNOW

## (A Quarterly Publication for VOSBs)\*



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## Contractors Found Ineligible for VetBiz Encounter Significant Wait Times

A recent change to the Notice of Rights sent to contractors denied inclusion in the VetBiz Vendor Information Pages (VIP) clarifies that contractors must wait six months to reapply.

Denied applicants to the VA's VetBiz Vendor Information Pages (VIP) Verification Program once had a choice: file a request for reconsideration within thirty days, or submit a new VA Form 0877 Verification application once they felt the issues in their denial letter had been addressed.

Whether it was to alleviate CVE's burden or to protect the integrity of VetBiz, the Notice of Rights sent to contractors now corresponds with the language of 38 CFR 8874.13 and 14 to read that contractors may not immediately reapply by submitting a new VA Form 0877. This means that contractors must now either request reconsideration (and risk another denial, as the

CVE can deny the application on previous or new grounds), or wait six months to reapply.

Either way, contractors will wait a considerable amount of time to be included in VetBiz. According to the Executive Director of CVE's testimony before Congress, at present requests for reconsideration are taking on average 200 days to process.

Contractors must get it right the first time. Corporate documents must clearly show that the veteran upon whom eligibility is based both owns and controls the business. If not, and a contractor is denied, a long wait is inevitable regardless of whether the contractor requests reconsideration or reapplies.

The regulations are available at: <http://www.law.cornell.edu/cfr/text/38/74.13> and <http://www.law.cornell.edu/cfr/text/38/74.14>.



## DID YOU KNOW?

Size protests must be filed with the contracting officer (CO), who then forwards the size protest to the Small Business Administration (SBA) Area Office. The contracting officer must receive the size protest within five business days.

In *TLC Catering, Inc.*, SBA No. SIZ-5388 (August 30, 2012), the protestor made the mistake of filing its protest with the GAO by the fifth day but not giving it to the CO until day six. The protest was dismissed as untimely.

Lesson Learned - Don't lose a bid protest due to a technicality. Know the rules.

### GAO Report Finds That Fraud and Abuse Remain in SDVOSB Program

An August 2012 Government Accountability Office (GAO) report concluded that fraud and abuse remains in the SDVOSB Program. This is because while VetBiz Vendor Information Pages (VIP) verification may be onerous and intrusive for some veteran-owned businesses, the VA may not be consistently applying the rigorous process of verification it implemented in 2010.

This process includes unannounced and announced site visits, as well as review and

analysis of company documents to validate a firm's eligibility.

The GAO report noted that the VA has made numerous conflicting statements about the implementation and tracking of the more rigorous verification process. For example, although the VA stated that by February 2011, the process would apply to all new verifications, as April 2012 only forty percent of the firms listed in VetBiz had been verified via this process. Of the remaining sixty percent (3,717 firms), 134 received a total of \$90 million in new VA SDVOSB sole-source or set-aside contracts during a 4-month period from

November 2011 to April 2012.

It may very well be that these firms who received contracts are eligible for the SDVOSB program. After all, they have undergone a verification process, and they have self-certified by holding themselves out as eligible.

At the same time, however, the VA has not uniformly applied the standards deemed necessary to ensure true eligibility for the SDVOSB program. Because of this, ineligible firms may have slipped through the cracks.

The August 2012 GAO report is at: <http://www.gao.gov/assets/600/593238.pdf>.

## VA Finds Loopholes to Avoid Conducting SDVOSB Set-Asides

Although the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the Act) provides that the VA must conduct set-asides for SDVOSBs under certain circumstances, lately the VA has either ignored this mandate or found a (legitimate) way around it.

The Act provides that before using Federal Supply Schedule (FSS) procedures, a contracting officer must determine two things: 1) whether he has a reasonable expectation that two or more SDVOSBs will submit offers; and 2) whether the award can be made at a fair and reasonable price. If so, the award must be set aside for SDVOSBs. (38 U.S.C. §8127(d)(2006)).

Despite this statutory mandate, the VA has failed to set aside awards for SDVOSBs on several recent occasions. As a consequence, the VA has been the subject of several sustained bid protests. For example, in *Kingdomware Technologies, Inc.*, even though the VA's own market research concluded that at least

20 SDVOSBs held FSS contracts for the acquired services, it did not set the award aside for SDVOSBs. B-406507 (May 30, 2012).

Earlier, in a similar protest, the GAO sustained a pre-award protest when the VA failed to conduct market research to determine whether a solicitation issued off FSS should have been set aside for SDVOSBs. *Aldevra*, B-406331 (April 20, 2012).

One takeaway from these recent decisions is that SDVOSBs should be alert for awards that should be conducted as set-asides. Note that in *Kingdomware*, just one contractor of the 20 that held contracts for the acquired services stepped up to the plate.

But is protesting actually worth it for SDVOSBs? GAO recommendations are just that - recommendations, and subsequent acts by the VA demonstrate that it is not taking these recommendations seriously. For example, last month *Aldevra*, LLC filed yet another protest against the VA, on the exact same grounds, and again the GAO sustained the protest. *Aldevra*,

B-406492 (August 21, 2012). It appears that the VA is unfazed by its admonishment by the GAO.

Also, one must realize that the Act can be trumped. The Javits-Wagner-O'Day ("JWOD") Act calls for agencies to make certain purchases from nonprofits listed in the AbilityOne program. The VA recently determined that under JWOD, if purchases can be made from the AbilityOne program, the VA is not required to set the acquisition aside for SDVOSBs. This interpretation was recently upheld by the GAO in *Pierce First Medical; Alternative Contracting Enterprises, LLC - Reconsideration*, B-406291.3, B-406291.4 (June 13, 2012).

The message is clear: just because the requirements of the Act are met, don't bank on an SDVOSB set-aside.

*Kingdomware* may be accessed at: <http://www.gao.gov/assets/600/591245.pdf>. The former *Aldevra* is available at: <http://www.gao.gov/assets/600/590299.pdf>; and the latter is at: <http://www.gao.gov/assets/650/647247.pdf>.

**DID YOU KNOW?**

# 60%

The VA Center for Veterans Enterprises (CVE) is currently denying 60% of initial SDVOSB verification applications.

This figure was provided on August 3, 2012 by VA OSDDBU Executive Director, Thomas Leney, in his testimony before the House Veterans Affairs Subcommittees on Oversight and Investigations and Economic Opportunity.

### **VA Implements Bi-Annual Re-Verification Requirement for VetBiz Program**

On July 27, 2012, the Department of Veterans Affairs (“VA”) issued an interim final rule reducing the burden of re-verification under its VetBiz Vendor Information Pages (“VIP”) Verification Program (the “Program”). This rule, effective immediately, provides that service-disabled veteran-owned small businesses (“SDVOSBs”) and veteran-owned small businesses (“VOSBs”) that have already verified their veteran-owned and veteran-controlled status must re-verify once every

two years, compared with the prior annual requirement.

VA officials have observed from administering the Program since 2010 that an annual examination is not necessary to adequately maintain the integrity of the program. According to the VA, it conducts a thorough examination of personal and company documentation to verify ownership and control by a veteran, including reviewing the corporate documents, federal personal and business tax returns, personal history statements, and occasionally administering an on-site

investigation or interview.

The VA also notes that implementing a longer eligibility period is consistent with other Federal set-aside programs - for example, Historically Underutilized Business Zone (“HUBZone”) concerns re-certify every three years; and a program term of nine years applies to the Small Business Administration's (“SBA's”) 8(a) Business Development Program.

The full text of the rule may be accessed at its Federal Register entry at: <http://www.gpo.gov/fdsys/pkg/FR-2012-06-27/html/>.



## SYSTEM FOR AWARD MANAGEMENT (SAM) REPLACES OTHER CERTIFICATIONS

On July 29, 2012, the Government launched SAM, which consolidates the Central Contractor Registration (CCR), the Online Representations and Certifications Application (ORCA), and the Excluded Parties List System (EPLS). CCR and ORCA are no longer accepting new or updated submissions, so contractors should consult the SAM User's Guide to learn how to submit and revise information in this new system.

The SAM website is accessible at: <https://www.sam.gov/portal/public/SAM/>. The SAM User's Guide is at: <https://www.sam.gov/sam/transcript/>

### New Interactive Map Documents VA Claim Wait Times by Regional Office

While many of you reading this newsletter have had your disability compensation claims resolved, you have not forgotten what the claims process was like. One element you likely remember most clearly is the extreme delay, and the inability to receive any kind of real status update.

For the first time, it may be possible to estimate how long it will take for a decision on an initial claim. But this information is not available from the Department of Veterans Affairs (VA).

A recent analysis conducted by the Center for Investigative

Reporting (CIR) fully details the wait times on VA disability compensation claims by an interactive map that is updated weekly (<http://cironline.org/reports/map-where-veterans-backlog-worst-3792>). This interactive map displays the 58 VA Regional Offices (ROs) and the following information: the number of pending claims, average wait time for an initial decision, average wait time on appeal, and the number of veterans waiting 125 days or more.

As an item of interest, the CIR analysis identifies the most backlogged Regional Offices (RO). These are as follows, in descending order: Waco, Texas (1); New York, New York (2);

Indianapolis, Indiana (3); Phoenix, Arizona (4); Los Angeles, California (5); Chicago, Illinois (6); Reno, Nevada (7); Roanoke, Virginia (8); Oakland, California (9); and Baltimore, Maryland (10). Interestingly, the notoriously slow St. Petersburg, Florida RO is absent from the list. The quickest RO is Lincoln, Nebraska, which resolves claims in 117 days on average.

Even if your claim has been resolved, it may be worth passing along the CIR's interactive map to other veterans who are waiting. As you know, when it comes to VA disability compensation claims, any status update is appreciated.



## VetBiz Verification Affects Not Just VA Contracts

As everyone knows, VetBiz verification is mandatory for VA contracts only. A natural inquiry is whether VetBiz verification will become a requirement for solicitations issued by other federal government agencies.

The short answer is “no,” even in acknowledgement of the recent amendments to the Federal Aviation Administration’s (“FAA’s”) procurement guidelines. These now state that “unless [a] firm is designated as a SDVOSB on the VA website, the CO must not make an award to the firm as an SDVOSB.”

The FAA is likely on its own here, as it is questionable that such a regulation can stand. Sections 502 and 503 of the Veterans Benefits, Health Care and Information Technology Act of 2006 appear to authorize the VA only to require verification as a precondition to receiving an

SDVOSB set-aside contract. Also, other agencies have not shown intent to follow the FAA’s lead.

But this does not mean that VetBiz will not affect other solicitations. Not being listed in VetBiz may prompt a protest. For example, in May of 2012, a disappointed bidder filed a protest in relation to a U.S. Army SDVOSB set-aside, alleging that because the awardee was not listed in VetBiz, it was “conspicuous by its absence.” *SDVOSB Appeal of H&H-DMS Joint Venture*, SBA No. VET-229 (May 14, 2012). The awardee prevailed and retained its contract, but it likely expended significant legal fees, time, and stress to do so. A VetBiz listing may have avoided this.

The lesson is simple. The letter of the law is not likely to change to mandate VetBiz verification for non-VA contracts. But even if the law doesn’t change, not being listed in VetBiz leaves SDVOSBs more susceptible to protests.

## LEGAL MEETS PRACTICAL, LLC

### ABOUT

As I come from a family of both veterans and small business owners, it is my honor to dedicate my legal practice to assisting these two groups. My practice focuses on legal services for VOSBs and small businesses, and also VA disability compensation claims. I am admitted to the bar in Virginia and the District of Columbia.

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