

THE VOSB SUMMARY: NEWS YOU NEED TO KNOW

(A Quarterly Publication for VOSBs)*



TABLE OF CONTENTS

1. **DODGING A BULLET, GETTING SHRAPNEL: HOW SEQUESTRATION AFFECTS THE VA**
2. **NEW FULLY DEVELOPED CLAIMS PROGRAM EXPEDITES VA CLAIMS**
3. **COFC DECISION EXPOSES IRREGULARITY BETWEEN VA AND SBA SDVOSB PROGRAM**
4. **VULNERABILITY IN SAM AFFECTS THOUSANDS OF CONTRACTORS**
5. **GAO REPORT GIVES THE GOODS (AND BADS) ON THE VETBIZ PROGRAM**
6. **BROTHERS CHARGED WITH DEFRAUDING THE VA**

Dodging a Bullet, Getting Shrapnel: How Sequestration Affects the VA

As individuals working for or dealing with the Department of Veterans Affairs (VA) know, the VA is exempt from the sequestration that took effect on March 1 of this year. This does not mean, however, that the VA will not feel the effects of sequestration. A hit to the Department of Defense (DoD) results in collateral damage to the VA and the veterans it supports.

Under the letter of the law, the VA and its medical care programs are exempt from sequestration. This was not, however, initially clear, which resulted in concern within the VA and veteran community. To clarify the issue, on April 23, 2012, the Office of Management and Budget (OMB) issued a letter stating that "all programs administered by the VA, including Veterans' Medicare Care, are exempt from sequestration."

Despite the exemption from sequestration, the VA will feel its effects. Support received from other agencies will lessen due to resource strain within these agencies. This applies to the DoD in

particular, which works in collaboration with the VA to meet many objectives. On March 28, the DoD announced that its 750,000 civilian employees will be required to take 14 days of unpaid leave from mid-to late June through September 30. This amounts to requiring these employees to take off approximately one day in unpaid leave per week during this short time frame.

In addition to the direct impact on VA departments and programs, there will be a reduction in veteran services and resources due to a ripple effect from other agencies. This includes the Department of Labor's (DOL's) VETS-job-training program; the DOL's employment and transition assistance programs; homeless veteran programs; and DoD mental health counselor availability.

The VA may be exempt from sequestration, but it is not untouched by its effects. Time will tell how the damage to other agencies will affect the VA.



DID YOU KNOW?

If a disappointed bidder wishes to contest a contracting agency's determination that it is ineligible for the SBA's SDVOSB Program, the appropriate forum is the Government Accountability Office (GAO).

In *347 Construction Group*, SBA No-Vet-232 (February 22, 2013), the SBA OHA reiterated it will only entertain an SDVOSB status protest directed against a procurement's *apparently successful offeror*. Because 347's bid protest grounds related to the conduct of the procurement, the proper forum was the GAO.

Lesson Learned - Know where your battle is, not just what it's about.

New Fully Developed Claims Program Expedites VA Claims

With the Department of Veterans Affairs' (VA's) new Fully Developed Claims (FDC) Program, a veteran may expedite his disability claim. Before pursuing this option, however, it is vital that a veteran understands how the Program works. With one mistake, he'll find himself out of the express lane and back in the standard lane.

In order to pursue a claim through the FDC Program, a veteran must do three things: 1) submit his claim on the VA Form 21-256EZ; 2) submit with his claim any relevant private medical treatment records and/or

identify the medical records that may be available at federal facilities; and 3) if applicable, report for any medical examinations scheduled by the VA. Then the claim will be placed in a priority channel for review.

With a current backlog of over 900,000 claims and a year-long wait for some initial decisions, veterans will welcome the chance to expedite their claim. It is important, however, that they fully understand how to take advantage of this opportunity:

First, they must make sure they have *all* information necessary to render the claim appropriate for the FDC Program. If the VA finds that other private care medical records are

necessary, it will pull the claim from the FDC Program queue and put it in the Standard Claims Process queue.

Second, they must make sure they have thought of everything to include. While additional evidence may be submitted to support a claim in the FDC Program queue, the penalty is the claim will be removed from the FDC Program queue and put in the Standard Claims Process.

For more information on the FDC Program, visit: <http://benefits.va.gov/transformation/fastclaims/>. A copy of the FDC Program application is available at: <http://www.vba.va.gov/pubs/forms/VBA-21-526EZ-ARE.pdf>.

COFC Decision Exposes Irregularity Between VA and SBA SDVOSB Regulations

On February 14th, the United States Court of Federal Claims (CoFC) held that the VA's regulations for the Veterans First Program differ from those of the Small Business Administration's (SBA's) Service-Disabled Veteran-Owned Small Business (SDVOSB) Program. In doing so, it reinstated Miles Construction Company, LLC's (Miles) SDVOSB verified status in the VA's Vendor Information Pages.

In this case, Miles had been verified as an SDVOSB by the VA's Center for Veterans Enterprise (CVE). Its status was protested when it was awarded a VA contract for storm sewer repairs. Interestingly, while the OSDBU rejected the basis of the protest lodged by the second-lowest bidder (affiliation issues), it sustained it on other grounds: unlawful transfer restrictions. Miles' corporate documents contained a right of first refusal transfer restriction.

In finding that the right of first refusal provision was permitted under the VA regulations governing the Veterans First Contracting Program, the CoFC noted: "it is presently executory, is a standard provision used in normal commercial dealings, and does not burden the veteran's ownership interest until he or she chooses to sell some of his or her stake."

While this is certainly a triumph for Miles in this instance, the end result is confusion: as the CoFC noted in its decision, the operative VA rule (38 CFR Part 74.3) is materially different from the text in the operative Small Business Administration rule (13 CFR Part 125.9). This means that if this contract had not been awarded as a set-aside under the Veterans First Contracting Program, the protest may have been sustained due to the right of first refusal provision.

The takeaway?

Because of the differences in the regulations, Miles may be an eligible SDVOSB for VA procurements, but not for

solicitations issued by other federal agencies.

As many veteran businesses are aware, the ultimate goal is for the CVE's verification process to apply government-wide. As a recent Government Accountability Office report pointed out, the system is still undergoing growing pains. This decision illustrates one such growing pain: working to ensure that the regulations governing eligibility are uniform across all federal agencies.

The CoFC full decision may be accessed at: <http://www.uscfc.uscourts.gov/sites/default/files/LETTOW.MILES.pdf>. The new verification assistance brief on transfers is at: <http://www.va.gov/osdbu/veteran/transferRestrictionsBrief.asp>.



DID YOU KNOW?

The VA Center for Veterans Enterprises (CVE) revamped its website. It now includes: statistics of verification/R4R success rates and wait times; additional Verification Assistance Briefs; and top ten reasons for denial. An issue with quorum provisions in corporate documents is the number one reason for denial, accounting for 35% of all denials.

Visit the CVE's verification statistics page at: <http://www.va.gov/osdbu/veteran/>

Vulnerability in SAM Affects Thousands of Contractors

Who knew that doing business with the federal government came at the risk of identity theft? On March 15, the General Services Administration (GSA) reported a security vulnerability in the System for Award Management (SAM). By following a unique series of steps, an entity record manager could potentially see the sensitive information of another company.

Registrants using a social security number instead of a FEIN in

order to do business with the federal government, and who "opted in" to public search, were identified as being at a higher risk for identity theft.

This vulnerability is worrying for a number of reasons, particularly due to the delay in action by GSA. Registrants, including those at a high risk for identity theft, were not notified of the exposure until March 15th, a full week after the exposure was discovered on March 8th.

In response to this incident, the GSA announced that it "has implemented compensating

controls to address the immediate vulnerability and is conducting a full security review of SAM." (Further details appear unavailable). It also sent out emails to those registrants using their social security numbers in SAM, providing an access code for free credit monitoring for a year. It also urged registrants to monitor their credit and financial institution activity.

The GSA's SAM Vulnerability FAQs webpage is here: <http://gsa.gov/portal/content/167855>. Please note that as of today's date (4.2.2013), SAM users may not edit or update their accounts.



DID YOU KNOW?

The VA Center for Veterans Enterprises (CVE) recently posted nearly a dozen more Verification Assistance Briefs to the VetBiz website. These briefs address the most common reasons for verification denials, and are intended to increase the current 60% verification success rate.

Visit the CVE's Verification Assistance Briefs page at: <http://www.va.gov/osdbu/veteran/vapVAB.asp>.

GAO Report Gives the Goods (and Bads) on the VetBiz Program

On January 16, 2013, the Government Accountability Office (GAO) released a report addressing the Department of Veterans Affairs' (VA's) VetBiz Verification Program. Finally we have figures, including how many VA contract dollars go to veteran-owned small businesses; and the success rates for verification applications, requests for reconsideration (R4R), and re-verification requests.

In terms of contract dollars, the GAO reported that in 2011, the latest fiscal year for which information is available, 20.5% of VA contract dollars were awarded to veteran-owned small businesses. The vast majority of this percentage went to service-disabled veteran-owned small businesses.

The GAO report also provided percentages

of businesses successful in verification applications, requests for reconsideration, and re-verification requests. This was based on applications or requests made to, and resolved by, the VA between November 2011 and September 2012.

According to the GAO report's figures, 61% of initial verification applications were approved, while 48% of R4R were granted. 80% of re-verification requests were approved. This same information is now also available on the VetBiz website, which is updated periodically to provide the most recent figures.

The GAO report also scrutinizes the current VetBiz Program procedures. The VetBiz Program, which is new compared with other government certification programs, is still undergoing growing pains. In general, the GAO concluded that while the VA has made advances in improving its timeliness and consistency in verifying contractors' eligibility,

implementing the program government-wide is not yet a viable possibility.

The GAO looked specifically to the plan developed by the VA's Office of Small and Disadvantaged Business Utilization (OSDBU), which applies to the VetBiz Program. It noted that while the OSDBU had partially applied key leading strategic planning practices, "the plan lacks performance measures to assess whether the desired outcomes are being achieved and has a short-term focus that is not typically associated with a strategic plan." The VA also has not shared the plan with key stakeholders, including congressional staff. Further, issues with the data system hinders the VA's ability to operate, oversee, and monitor the program.

The January 16, 2013 GAO report may be accessed at: <http://www.gao.gov/assets/660/651281.pdf>.



Brothers Charged With Defrauding the VA

On March 15, a U.S. Attorney announced that two New York brothers were arrested and charged by criminal complaint with major fraud against the U.S. If convicted, they face a maximum penalty of 10 years in prison, a \$1 million fine, or both.

So what are they accused of doing? According to press releases posted on the Department of Veterans' Affairs (VA's) and the Department of Justice's (DOJ's) website, the Testa brothers began a second business and fraudulently represented it as a service-disabled veteran-owned small business (SDVOSB). They then applied for and received approximately thirteen million dollars worth in government contracts from the VA, which were set aside for SDVOSBs.

As stated by U.S. Attorney William J. Hochul, "these defendants stand accused of

pretending to be disabled service veterans. In doing so, the defendants deprived other small business owners of financial opportunities which the Service-Disabled Veteran Owned Small Business program is specifically designed to assist."

Here's an interesting point. This is the type of fraud the VA's VetBiz verification program is designed to prevent...but sometimes it doesn't. Legitimate businesses have been denied due to drafting issues with their corporate documents. They really *are* eligible for the set-aside program, just not on *paper*. Meanwhile, ineligible companies are verified because they know the regulations and how to manipulate them.

Access the VA's press release (and updates, as issued) at: <http://www.va.gov/osdbu/>. Keep in mind that criminal defendants are innocent until proven guilty, and scant facts on this case have been released.

LEGAL MEETS PRACTICAL, LLC

ABOUT

My legal practice, based in Arlington, Virginia, is designed to help growing VOSBs. I come from a family of both veterans and small business owners, and I understand the value in legal counsel who can clearly communicate while providing effective legal solutions. Hiring a lawyer should simplify your life, not complicate it.

MISSION STATEMENT

My mission is to provide accessible, high-quality legal services to small business owners and to veterans.

BLOG

If you found the information in this newsletter helpful, sign up for my weekly blog at: <http://www.legalmeetspractical.com>.

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