

THE VOSB SUMMARY: NEWS YOU NEED TO KNOW

(A Quarterly Publication for VOSBs)*



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THE NDAA'S IMPACT ON SMALL BUSINESS

On January 3, 2013, President Obama signed into law the National Defense Authorization Act of 2013 (NDAA), which includes contracting reform legislation introduced by the House Small Business Committee. This legislation was the result of the findings of ten contracting hearings during 2011 and aims to maximize opportunities for small businesses in the federal marketplace.

The provisions of the NDAA affecting small businesses are at Sections 1631 to 1699a. Notable provisions include the following:

Sections 1631 to 1633 of the NDAA enforce existing small business contracting goals and provide means to assess efforts to reach these goals.

Section 1651 changes limitations on subcontracting from cost to price. This makes it easier for small businesses to comply with procurement rules, while also allowing them to team together to pursue larger contracts.

Section 1652 provides harsh penalties for violating the limits on subcontracting. Companies found in violation must pay the greater of either \$500,000, or the amount spent on the subcontractor in excess of permitted levels.

Section 1681 through 1683 protect small businesses by increasing the penalties for fraud. Section 1681 implements a safe harbor provision for good faith compliance efforts with small business requirements. However, this provision applies only if a business violated a rule after relying upon a written advisory opinion from either a Small Business Development Center or Procurement Technical Assistance Center. Section 1682 requires that fraudulent businesses be suspended or debarred, and Section 1683 provides for the production of an annual report on suspensions and debarments proposed by the SBA.

Section 1697 helps woman-owned small contractors by removing the set-aside caps on the women's contracting program. It also requires the production of a report that identifies industries, as defined under NAICS, in which women-owned companies are underrepresented. The first report is due to Congress in 2018.

The full text of the NDAA can be accessed at: <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4310enr/pdf/BILLS-112hr4310enr.pdf>. Take a look to see the provisions that may affect your business.



DID YOU KNOW?

In December of 2012, The Department of Justice 's Acting Associate Attorney General, Tony West, announced that the government recovered nearly \$5 billion in settlements and judgments under the False Claims Act in FY 2012. This record recovery amount includes 650 qui tam (whistleblower) actions. Access Mr. West's prepared remarks here: <http://www.justice.gov/iso/opa/asg/speeches/2012/asg-speech-1212041.html>.

VA LAUNCHES CONTEST TO REPLACE OUTDATED MEDICAL APPOINTMENT SCHEDULING SYSTEM

The VA is offering an enticing contracting and marketing opportunity for software developers: to help it design a new medical appointment scheduling system to replace its outdated one. The winner will receive not only software development work from the VA, but extensive coverage in VA press releases.

The VA's Medical Appointment Scheduling System (MASS) contest is driven by its decision to replace a system that does not meet current requirements or provide the flexibility to support new and emerging models of care. However, the VA is not seeking a deployable replacement product. It believes that the information it will obtain by direct evaluation of the entries will be superior in quality and can be obtained in significantly less time.

Via this contest, the VA will award as many as three prizes (up to \$3,000,000) for demonstration software or services determined to deliver the required functionality while remaining compatible with Open Source VitsA. Entries will be evaluated by first determining whether they are Open Source VistA compatible, and second whether they perform all Non-Functional requirements set forth in Attachment C. If entries meet both requirements, they move on to further evaluation.

The VA hopes to achieve two goals by launching this contest: *first*, to mitigate risks which the VA has identified as contributing to the failure of previous attempts to replace the 25-year-old Medical Scheduling Package (MSP); and *second*, to encourage commercial software vendors to actively engage in the development of solutions. As an incentive for participation, if the VA engages in

subsequent procurements of a replacement for the MSP, demonstration of open source compatibility in this contest will be taken into consideration.

The contest was formally announced in the Federal Register on October 16, 2012 (<https://federalregister.gov/a/2012-25408>). Contractors must register by May 13, 2013, and all entries must be finalized by June 13, 2013. The winners will be announced on or about September 30, 2013.

The VA's website providing information on the contest may be accessed at <http://vascheduling.challenge.gov>. For the contestant process overview, see: http://www.ehealth.va.gov/docs/mass/TCMS-Contestant_Process_Overview.pdf.

RECENT DECISIONS AFFIRM “RULE OF TWO” NOT MANDATORY FOR FSS CONTRACTS

In a huge defeat for SDVOSBs and VOSBs, on November 29th the Court of Federal Claims (CoFC) ruled that the Department of Veterans Affairs (VA) acted reasonably in determining that it need not set aside Federal Supply Schedule (FSS) contracts for SDVOSBs. *Kingdomware Technologies, Inc. v. U.S.*, CoFC No. 12-173C (November 27, 2012).

Kingdomware was supposed to be a victory for VOSBs and SDVOSBs – a means to showing the VA that it must conduct set-asides under the Veterans Benefits Act. Instead, the case merely affirmed the VA's position. And due to this decision, the GAO will no longer hear protests on the same grounds as those presented in *Kingdomware*.

The CoFC decision, issued by Judge Nancy Firestone, follows two Government Accountability Office (GAO) decisions that followed the same fact pattern: *Aldevra* and *Kingdomware*. (*Aldevra*, B-406205, March 14, 2012; *Kingdomware Technologies*, B-406507, May 30, 2012). In these cases, the protestors successfully alleged that the VA erred by failing to conduct market research to determine whether an FSS solicitation should be issued as an SDVOSB set-aside.

The Veterans Benefits Act provides that a contracting officer shall set aside a VA FSS contract if he determines that:

1) two or more responsible VOSBs will make offers; and 2) the award can be made at a fair and reasonable price. [38 USC §8127(d)]. This provision is often referred to as the “Rule of Two.” In a decision based purely on statutory analysis of this provision (looking at related statutory language and traditional application by the VA), Judge Nancy Firestone determined that the Rule of Two was not mandatory in nature.

Now, the GAO has taken the position that it will no longer hear protests arguing that the Veterans Benefits Act requires the VA to consider setting aside an FSS procurement for SDVOSBs or VOSBs. *Kingdomware Technologies – Reconsideration*, B-407232.2 (December 13, 2012). As noted in this recent case: “Although our Office is not bound by [the CoFC’s] decisions, its decision in *Kingdomware*, together with the VA’s position on the meaning of this statute, effectively means that protesters who continue to pursue these arguments will be unable to obtain meaningful relief.”

The GAO’s position, however, does not indicate that it agrees with the CoFC decision. In fact, just two months earlier, the GAO had sustained a protest on grounds identical to those presented in *Kingdomware*. *Phoenix Environmental Design, Inc.*, B-407104, (October 26, 2012). Rather, the GAO has concluded that to sustain a protest on such grounds would be pointless because the VA would not follow the decision.

The GAO’s decision in *Kingdomware* marks the end to the *Aldevra* line of cases. Without the CoFC on its side, the GAO has no mechanism to ensure that the VA will adhere to its rulings (In fact, the VA did not following the sustaining of the earlier *Aldevra* and *Kingdomware*).

Going forward, the only ways to change this are for *Kingdomware* to appeal to the U.S. Court of Appeals for the Federal Circuit, or for veterans organizations to unify to seek clarification from Congress. Both of these options are uphill battles. With respect to a court appeal, judges are loathe to overturn one another’s decisions. This particular case presents an even greater challenge because Judge Firestone’s decision was one of pure statutory analysis.

As it relates to seeking clarification from Congress, veterans organizations may be able to lobby Congress to clarify that the Rule of Two was intended as mandatory in nature. Given the VA’s stance on the issue, however, it will clearly push back, and Congress may choose to defer to the VA’s interpretation of its own statute.

Only time will tell how this development will play out for veteran-owned businesses. For further reading, a copy of the *Kingdomware* CoFC decision may be accessed at: http://www.uscfc.uscourts.gov/sites/default/files/FIRESTONE.KINGDOMWAR_E112712.pdf. The GAO decision may be accessed at: <http://www.gao.gov/assets/660/650917.pdf>.



DID YOU KNOW?

According to a yearly report issued by the GAO on November 14, 2012, 2,475 protests were filed in FY 2012, which represents a 5% increase from 2011. Access the full report at: <http://www.gao.gov/assets/650/649957.pdf>.

VA TO RECOGNIZE FIVE DISABILITIES AS SECONDARY TO TBI

The Department of Veterans Affairs ("VA") is amending its regulations to impact veterans with service-connected traumatic brain injury ("TBI"). Under these amendments, five diagnosable illnesses will be *presumed* secondary to service-connected TBI (the "Secondary Disabilities").

The five Secondary Disabilities are:

- Parkinson following moderate or severe TBI;
- Unprovoked seizures following moderate or severe TBI;
- Dementias (presenile dementia of the Alzheimer type and post-traumatic dementia) if manifested within 15 years following moderate or severe TBI;
- Depression if manifested

within three years of moderate or severe TBI, or within 12 months of mild TBI; and

- Disease of hormonal deficiency that result from hypothalamo-pituitary changes if manifested within 12 months of moderate or severe TBI.

Under these amended regulations (codified at 38 CFR §3.310), a veteran will be presumed to have these disabilities as secondary to service-connected TBI unless there is "clear and convincing" evidence to the contrary.

Evidence of "clear and convincing" evidence to the contrary includes: 1) evidence that the Secondary Disability predated the TBI; 2) medical evidence that another disability caused the Secondary Disability; or 3) medical evidence that the

Secondary Disability is unrelated to the TBI.

The practical effect of this rule is as follows: if a veteran already has service-connection for TBI (at a sufficient level of severity), as well as a diagnosis of one of the Secondary Disabilities, he is also entitled to service connection for the Secondary Disability. Alternatively, if a veteran is seeking compensation for service-connected TBI, he is also eligible for compensation for a Secondary Disability.

The effective date of the new amendment is February 8, 2012. Comments must be received on or before that date to be considered by the VA. For a complete copy of the rule and instructions for providing comments, visit: <http://www.gpo.gov/fdsys/pkg/FR-2012-12-10/pdf/2012-29709.pdf>.



VA FORECAST OF PROCUREMENT OPPORTUNITIES

Interested in predicting or tracking VA procurement opportunities in the new year? Check out the VA's forecast of procurement opportunities located at: <https://www.vendorportal.ecms.va.gov/eVP/FCO/FCO.aspx>.

VA VETBIZ PROCESSING WAIT TIMES STILL LEAVE MUCH TO BE DESIRED

According to recent Congressional testimony, headway is being made towards minimizing wait times for inclusion in the VA's VetBiz Vendor Information Pages (VIP) database (VetBiz). Unfortunately, this headway does little to benefit businesses waiting to reapply or on a decision for reconsideration. These processes take a much longer time, and reflect the growing pains of a relatively young program.

On August 2, 2012, Mr. Thomas Leney, the executive director of the Office of Small and Disadvantaged Business Utilization, appeared before Congress and testified relating to the VetBiz verification process (testimony available at: <http://veterans.house.gov/witness-testimony/mr-thomas-j-leney>). This testimony followed up on a prior hearing on November 30, 2011, and again, it addressed a question

all veteran contractors want answered: is there an improvement in VetBiz application processing times?

For *initial verifications*, the answer is "yes." During the more recent hearing, Mr. Leney stated that a July 2011 processing time of 130 days had been "improved upon" but declined to say whether the 75-day forecast cited during his November 2011 testimony was still accurate.

For veteran contractors who have been *denied*, however, the answer is "not really." When Mr. Leney appeared before Congress on August 2, 2012, he relayed that requests for reconsideration are currently taking 200 days to process. (The VA's Initial Verification Application Guide, dated August 24, 2012, cites a 180-day figure). CVE is currently inundated with requests for reconsideration, and even if the issue with an application can be resolved fairly easily, the fact of the matter is that a request for reconsideration takes its place in a queue. It isn't looked at

until an overworked CVE examiner reaches it in the pile, which can take months.

For contractors opting to reapply, a six-month wait period applies, plus the time it takes for the CVE to process a complete application.

The lesson here is simple: get it right the first time, or take your place in very slow line. If you present the CVE with a complete, accurate, and carefully reviewed application, you're making your chance at successful verification much higher (and, not to mention, the CVE examiner reviewing your application much happier).

For further guidance for first time-applicants, it may help to review the VA's Initial Verification Application Guide at: <http://www.va.gov/osdbu/docs/vapInitialVerificationApplicationGuide.pdf>, as well as other resources at <http://www.vetbiz.gov>.



REVERIFICATION, NOT REMOVAL: HOW TO AVOID BEING AN EXPIRED LISTING

On November 29, 2012, the CVE announced on vetbiz.gov that it will remove veteran-owned businesses listed in the Vendor Information Pages (VIP) as in "reverification" status. If your company is one of these businesses, it is important to take action to ensure continued eligibility for the Veterans First Program. Also, even if you are not one of those businesses, you can take action to provide that your VetBiz VIP listing does not expire prior to successful reverification.

On June 1, 2012, the VA established a Class Deviation to VAAR 819.7003 in order to avoid disadvantaging firms who were applying for re-verification but whose eligibility would expire prior to the CVE being able to make a determination. The class deviation established a status of "Reverification" for these companies.

In essence, the class deviation provided a cushion to these companies. Between when a company's eligibility had expired, and when its status would be reverified in CVE, a company remained visible in the VIP database and could continue to submit proposals for VA Veterans First set-aside contracts. If selected for an award, the company's

application would be processed on a "Fast Track" that resulted in a determination within 21 business days.

The class deviation expired on September 30, 2012. Thus, all expired firms listed as in "reverification" status will be removed from the VIP database. Via its press release on November 29, the CVE urged contractors to contact it if they believe they will be removed in error.

The press release also encouraged contractors within their two-year eligibility period to apply for reverification up to 120 days prior to the expiration of their VetBiz VIP listing. This early application provides a cushion in the event delays occur due to missing or outdated applicant information.

However, the release doesn't mention other points worth hearing. In general, remember to monitor your company's status - ultimately, it is your responsibility. Contact the CVE with problems and concerns, and document all communications with the CVE.

The VA's press release can be accessed at: <http://www.va.gov/osdbu/pressreleases/news20121129.asp>.

LEGAL MEETS PRACTICAL, LLC

ABOUT

My mission is to provide accessible, high-quality legal services to small business owners and to veterans. As I come from a family of both veterans and small business owners, 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.

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