

THE VOSB SUMMARY: NEWS YOU NEED TO KNOW

(A Quarterly Publication for VOSBs: The Summer Edition)*



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VA to Transfer VetBiz to SBA...Eventually

Many veteran business owners whose companies are listed in VetBiz have followed the developments with transferring the VetBiz process from the VA to the SBA. Will the SBA take over or not? And if so, when?

In late May, the U.S. House of Representatives answered the first question. Yes, it is likely that the SBA will take over the process. It passed the 2015 defense authorization bill, which includes provisions to transfer VetBiz SDVOSB verification from the VA to the SBA. The provisions of this bill are substantially similar to those of the Improving Opportunities for Service-Disabled Veterans Act of 2013 (HR 2882), which now has nine co-sponsors.

If the Senate agrees, and President Obama signs the bill into law, the process of transferring SDVOSB verification from the VA's Center for Verification and Evaluation to the Small Business Administration could begin later this year.

The second big question is - "when?" Looking to the timeline set by the NDAA, four years seems about right.

Under the NDAA's terms, the VA must enter into a Memorandum of Understanding (MOU) with the SBA within 180 days, under which the VA will transfer control and administration of the SDVOSB verification program to the SBA. That's six months right there.

Then, within 270 days of the execution of the MOU (or nine additional months), the SBA is to establish rules to carry out the verification program. The SBA and

the VA may extend these deadlines, but they must report their progress to Congress every 180 days.

Under this timeline - with six months to enter the MOU and another nine months to establish SBA rules, with leave to extend the nine months - this means that it might be over a year and a half before the SBA has rules in place for implementing the VetBiz program.

And then what? How will this affect the current procedures used by the CVE? For example, the CVE doesn't have solid guidelines in place for how to report "changes or circumstances that might affect eligibility." (This is what the verification letters say, but what does this mean? When must changes be reported? Within a week? Two months? And what are the consequences for not reporting changes?) It also still requests verification documents that are irrelevant (such as bylaws for an LLC). Will the SBA do a complete overhaul of the policies and procedures? What will this entail, and how long will this take?

More importantly, how will this impact those already listed in the VetBiz registry? It hardly seems fair to make them go through the gauntlet before their two-year verification period expires; then again, all who earn a listing in the VetBiz registry should go through the same process.

We'll see. Eventually.

For more information on the bill, visit: <http://beta.congress.gov/bill/113th-congress/house-bill/4435>.



VA ANNOUNCES ATLANTA AS THE 2014 NATIONAL CONFERENCE LOCATION

In July of 2014, the VA finally announced the location and date of its annual National Veterans Small Business Engagement (NVSBE): in Atlanta, Georgia at the Georgia World Conference Center, from December 9 through December 11!

The NVSBE, which is generally held in the summer of each year, offers a wonderful opportunity for veteran business owners to interface with procurement officials, network with prospective teaming partners, attend valuable training sessions covering a variety of topics applicable to federal contractors, and listen to keynote speakers. Also, if you're so inclined, you can rent a booth in the exhibit hall to showcase your company's services and products to the federal marketplace.

I attended the NVSBE last year and found it to be a truly valuable experience. For more information, visit the VA's website on the conference at: <http://nvsbe.com/>. Please note that registration opens on September 1, and an early bird discount will likely apply.

The "Rule of Two:" How Much Does it Help SDVOSBs?

With the recent appellate *Kingdomware* decision, the VA's "Rule of Two" has gotten a lot of press lately. And now, another bid protest decision illustrates how the general rule to set aside solicitations for small business lacks teeth in some ways.

The "Rule of Two" under the Veterans Benefits, Healthcare and Technology Act allows a contracting officer (CO) to set aside certain solicitations for SDVOSBs when he has a reasonable expectation that two or more SDVOSBs will offer a fair and reasonable price.

In *Kingdomware*, veteran protestors argued that the mandatory language "shall" in the statute required the VA to set the award aside in these circumstances. The VA disagreed, and when the case was kicked up to the Court of Federal Claims, the court sided with the VA's interpretation. On appeal, the district court upheld the ruling.

Contracting officers are also required to set aside contracts for small businesses generally when the value exceeds \$150,000 (FAR 19.502-2(b)). However, a recent bid protest decision shows that a CO isn't required to cancel or amend a solicitation when he later learns of interested, responsible small businesses. This is true even when these vendors couldn't have known that the agency was seeking small businesses for the opportunity.

In *Jacqueline R. Sims d/b/a JRS Staffing Services*, the GAO held that a small business's expression of interest in a solicitation came too late to affect an agency's decision to set aside the work for small businesses under "rule of two." There, the Department of Justice (DOJ) had reviewed the SBA Dynamic Small Business Search database, looking for small businesses in South Carolina that were appropriate for the work. Based on its market research, it released the RFQ under unrestricted competition.

Small business, *Jacqueline R. Sims d/b/a JRS Staffing Services*, notified the CO that it was interested in competing under the RFQ as a small business. Because

JRS was a Georgia company, it had not appeared in SBA Dynamic Small Business Search database. However, the DOJ declined to set aside the opportunity, and JRS protested to the GAO.

Unfortunately for JRS – and for other small businesses that would seek to have solicitations set aside under the "rule of two," the GAO held that the DOJ had reasonably confined its market research to businesses located in South Carolina. It also noted that the DOJ was not legally required to change the solicitation to a set-aside after the solicitation was issued.

Agencies have set-aside goals, and regulations are in place to give contracting officers discretion in meeting these goals. But when it comes down to it, that discretion can prevent these rules from having teeth.

Access the JRS bid protest decision at: <http://www.gao.gov/assets/670/664193.pdf>.

**FORMER BUSINESS
EXECUTIVE CHOSEN
AS VA SECRETARY**

On July 27, the U.S. Senate confirmed President Barack Obama's nomination of former Procter & Gamble executive Robert McDonald as the next Secretary of the United States Department of Veterans Affairs (VA). He will replace acting Secretary Sloan Gibson, who has occupied the position since Eric Shinseki resigned in mid-May.

While Shinseki initially expressed his intention to remain as Secretary, this changed after a report by the VA's Office of Inspector General (OIG) confirmed the public's worst fears about veteran treatment at several VA medical centers and "fudging the numbers" at the healthcare center in Phoenix.

In choosing McDonald for the post, Obama is signaling his desire to install a VA chief with broad management experience. McDonald also has a military background, graduating near the top of his class at the U.S. Military Academy

at West Point and serving as a captain in the Army, primarily in the 82nd Airborne Division.

McDonald resigned abruptly from Procter & Gamble in May 2013 amid pressure from investors concerned that he was not doing enough to boost the company's performance. This isn't the best way to depart, but we don't know what this actually means. As it is a point of interest, it is likely that more information about his departure from Procter & Gamble will become public.

Personally, I believe that someone with a strong business background is a smart pick for the new Secretary. The VA is in desperate need of someone skilled in process improvement, practical solutions, and who possesses business savvy. We need someone who makes improvements and changes with actual teeth. We don't need more memorandums and reports.

One thing important to remember, however, is that McDonald is inheriting a broken system. The VA isn't

going to significantly improve, quickly, regardless of who Obama places in charge. I think most people know we can't expect a fast fix, but this is worth mentioning. We're appointing a Secretary, not a Superman.

Another issue is red tape. Even if McDonald has the capacity to effect change, what type of process must he go through to do so? The bureaucratic nature of the system might impede him.

Good luck to Mr. McDonald. He's going to need it.

*Access the May 2014 OIG report on wait times and scheduling practices at the Phoenix Health Care System at: <http://www.va.gov/oig/pubs/VAOIG-14-02603-178.pdf>.



KNOWING WHEN TO PROTEST LONG-TERM CONTRACTS

In a June protest before the SBA Office of Hearings and Appeals (OHA), contractor Strata-G protested the Army's decision to restrict future orders to another contractor, TFAB, via a modification. As affirmed by the SBA OHA, SBA regulations do not contemplate a size protest in response to a modification of an existing long-term contract. *Strata-G Solutions, Inc.*, SBA No. SIZ-5563 (2014).

As noted by the SBA OHA, contracts with performance periods of more than five years are considered "long-term contracts. SBA regulations permit size protests of such procurements to be filed at *three* junctures: **first**, at the time the long-term contract is initially awarded; **second**, when an option is exercised; and **third**, in response to a contracting officer's request for size certifications in connection with an individual order.

To get smart on the rules, access the Strata-G decision at: http://stanhinton.com/OHA_Decisions/SIZ-5563.pdf.

One Pricey Band-Aid: VA Wants \$17.6 Billion to Fix Healthcare

In mid-July, the acting Secretary of Veterans Affairs, Sloan Gibson, told the Senate Veterans Affairs Committee that the VA needs \$17.6 billion to fix its healthcare system. According to Gibson, the money would help the VA decrease appointment times and allow it to hire new doctors.

While some members of the Senate committee were on board with the request - given the obvious evidence that more money is needed for these purposes - others weren't impressed. For example, Senator Mike Johanns of Nebraska, questioned whether VA care would improve if it received additional funding.

"This sounds so similar to what we've heard over the years,"

Johanns said, adding that the committee had routinely met previous VA requests for additional funding. "If you can't clean up your act, then guess what? You lose out," he continued. "I don't think you need more billions and billions of dollars."

Gibson said the VA would use the \$17.6 billion to hire 10,000 new clinical staff members, including 1,500 doctors. It would allocate \$6 billion for infrastructure improvements, including building eight new medical facilities and leasing 77 more around the country.

The money would come on top of funds included in a separate bipartisan reform bill that both Houses passed in June. That legislation is in a committee to work out differences.

Obviously, additional funds to provide for improved medical

services will positively impact veterans in the VA's healthcare system. But the question is, shouldn't the VA already know how much money it needs to provide adequate services to its veterans? And now it's saying it needs another \$17.6 billion to do the job right?

Another point is where the priorities should be. The focus should be on the funds and measures needed for systemic reform. Without substantive change, Congress can't expect the VA healthcare system or its bureaucracy to act differently than in the past. It needs reform to promote accountability and transparency.

We'll see where this leads us. The VA healthcare system can't be fixed in a few weeks, or months, or probably even in a few years. But one thing's for certain - to do so, it needs a surgery, not a Band-Aid.



SBA PROPOSED RULE OFFERS SHALLOW SAFE HARBOR FOR SIZE MISREPRESENTATION

On June 25, 2014, the Small Business Administration (“SBA”) published a proposed rule in the Federal Register designed to implement a safe harbor provision for misrepresentation as a “small” business concern. Businesses or individuals that have acted in good faith reliance upon small business status advisory opinions from Small Business Development Centers or Procurement Technical Assistance Centers will not be subject to the penalties created under 15 U.S.C. 645(a).

This is a narrow exception to the application of penalties that include monetary fines and up to two years of jail time. Under this rule, good faith misunderstandings won’t insulate a company from liability - it must have sought out an opinion from either an SBDC or PTAC.

In reality, many companies might not know how to do that, and time is also a factor - if a bid is due in a week, how long does it take to receive an opinion? Still, this rule encourages businesses to reach out to available (free) resources to ensure they’re acting in compliance with federal laws and regulations.

Access the rule at: <http://www.gpo.gov/fdsys/pkg/FR-2014-06-25/html/2014-14337.htm>. Comments are due on or before August 25.

The SBA Set-Aside Scorecard: HubZones & WOSBs Fall Short

A recently-released SBA procurement scorecard shows that the government technically met its small business prime contracting goals in FY 2013.

According to the scorecard, the government awarded \$83.1 billion in prime contracting dollars to small businesses, a rate of 23.39%. While this is a higher percentage than in FYs 2011 and 2012 (22.25% and 21.65%, respectively), the actual dollar amount awarded to small businesses was higher in these earlier years - \$89.9 billion and \$91.5 billion. This means that the government awarded around nine or ten billion less to small businesses in 2013 than it did in 2012 and 2011.

As reflected in the scorecard’s assessment of individual agencies, some fared better than others - for example, the

Department of Transportation received an “A+” for awarding 43.34% of contract dollars to small businesses and meeting all four of its socioeconomic goals. In contrast, the Department of Energy received an “F” for awarding only 5.71% of prime dollars to small businesses.

It must be acknowledged, however, that agencies’ setting aside of solicitations for small businesses depends on the nature of the work sought, and the likelihood of finding two or more responsible small businesses that will offer a fair and reasonable price. Some agencies will have an easier time finding small businesses to perform needed work compared with other agencies.

Overall, the government reached two of its four socioeconomic goals: 8.61% for small disadvantaged businesses (5% goal) and 3.38% for SDVOSBs (3% goal). However,

it failed to meet its 5% goal for WOSBs, awarding only 4.32% of contract dollars to this category. It also awarded only 1.76% of contract dollars to HUBZones, falling short of the 3% goal. Still, the SBA assessed the government an “A” rating for meeting its overall set-aside goals for small businesses.

The FY 2013 scorecard shows that many agencies are making sustained and committed efforts to meet their small business subcontracting goals. However, it’s interesting that the government received an “A” for meeting only two of its four socioeconomic goals. When I went to school, a 50% was an “F.”

Access the SBA’s Small Business Procurement Scorecard for FY 2013 at: <http://www.sba.gov/sites/default/files/files/FY13-Summary-Prime-Spend-Subk-Plan-Progress-2014-04-28.pdf>.



Homework Needed to Improve VR&E Program

A new bipartisan bill focused on giving wounded warriors improved rehabilitation and employment training was introduced in Congress in early July. The Wounded Warrior Employment Improvement Act (H.R. 5032), supported by several major veterans organizations, would reform the VA's Vocational Rehabilitation and Employment (VR&E) program, and require the VA to reduce caseloads, increase education program enrollment, and create a new training program for staff working with wounded warriors.

According to a recent GAO report, it often takes six years or more for veterans to achieve success in the VR&E program. A Wounded Warrior Project survey found that the unemployment rate among wounded service members is 17.8%.

In the current VR&E program, Vocational Rehabilitation Counselors (VRCs) and Employment Coordinators (ECs) help veterans who have service-connected disabilities find sustainable careers. VRCs provide job counseling, direct veterans to VA services specific to their needs, and connect veterans with training or other opportunities to help them reach employment goals.

The proposed bill takes a commonsense approach to improving the process. It requires the VA, 270 days after its passage, to develop and publish an action plan for improving the services under the VR&E Program. This includes providing a comprehensive analysis of weak points of the program and recommendations for improvement.

While the VA should be commended for taking steps to improve one of its valuable programs, the reality is the end result is another long memorandum, with a due date of a year from now.

After *that* is the real work.

Access the GAO's report on the VR&E program at: <http://gao.gov/products/GAO-14-61>.

THANKS FOR READING!

Below: Archer, the Legal Meets Practical, LLC Mascot



LEGAL MEETS PRACTICAL, LLC

ABOUT

My legal practice, based in the Atlanta area, is designed to help growing VOSBs, particularly with the VetBiz verification process. 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 on veterans issues at: <http://www.legalmeetspractical.com>.

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