FIRST CALL

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Update from NVSBC

A message from NVSBC Executive Director, Scott Denniston

The NVSBC Board of Directors hopes you are all enjoying your summer and are staying cool. A lot has happened over the past few weeks, including the NVSBC providing testimony to the House Veterans Affairs Committee on June 29th. The hearing dealt with several proposed bills impacting VA acquisitions:

- HR 2749: Protecting Business Opportunities for Veterans Act of 2017
- HR 2006: VA Procurement Efficiencies & Transparency Act
- HR 2781: Ensuring Veteran Enterprise Participation in Strategic Sourcing Act
- Draft Bill (No Number Assigned): Improve Hiring & Training of VA Acquisition Work Force

HR 2781 especially concerns us, as it addresses the VA's attempts to circumvent VETS First. The bill basically says the VA cannot use strategic sourcing contract vehicles unless the VA Secretary determines there are a "sufficient" number of SDVOSBs on the contract. What is a "sufficient" number? How will the Secretary determine that? There is no requirement that VA only buy from the SDVOSBs on the contract vehicle. The NVSBC has argued for the past year that strategic sourcing vehicles do not trump *Kingdomware*!

Last week, I put out a call regarding our "Communications Campaign." We are bringing attention to VA's circumvention of Vets First and *Kingdomware*, as well as GSA's treatment of SDVOSBs as it relates to VETS 2 GWAC. I asked members to meet with their Congressional delegations to discuss our issues as part of the communications campaign and received only ***nine responses.*** Not great!

For those who want to work with the VA or GSA, if you are not willing to be involved to make Vets First work as intended, in a few years you might find yourself asking "What happened to VETS First????" and "Why didn't I do something when I could?"

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NVSBC's purpose is to transition veterans into business owners servicing the federal government.

Watch NVSBC Testimony Before Congress!

Interested in watching the hearing on the four bills covered in this issue? Access it here.

Thank you to NVSBC member, Wayne Simpson, for representing us so well in his testimony provided before the House Committee on Veterans' Affairs Subcommittee on Oversight and Investigations.

COURT: WITHOUT PROPER PRECAUTIONS, YOU WORK FOR FREE

As a federal contractor, you may have learned the lesson taken away from a recent Court of Federal Claims ("CoFC") decision. This case reinforces that a contractor should only perform work required under the terms of its contract, or directed by an authorized government agent in accordance with the contractual terms. And importantly, a Contracting Officer's Representative ("COR") isn't always authorized to order additional work–even if that person acts as though he or she has such authority. In short, don't do work outside the scope of your contract unless you reserve your rights to file a claim for compensation, and act at the direction of the government representative who can actually authorize the work.

Baistar Mechanical, Inc., v. United States, No. 15-1473C (2016) involved a ground maintenance and snow removal services contract for the Armed Forces Retirement Home's property in Washington, D.C., including a 270-acre property providing residence to several hundred retired military members.

After Baistar was terminated for default, he filed several claims with the CoFC. One of these claims alleged that, throughout the period of performance, Baistar performed additional services at the request of Contracting Officer Representatives ("CORs"), but wasn't paid for them. This included various snow and ice removal services outside the contract.

Unfortunately for Baistair, under the explicit terms of the contract, only contracting officers had the authority to bind the agency for additional work or a change in services. It even went so far as to state that any work performed at the contractor's own volition or at the direction of someone who was not a CO "[would] be done at the financial risk of the contractor." While noting that a government agent can bind an agency if they possess *express or implied* contractual authority, the words of a contract trump any authority the CORs may have *acted* like they had. As such, the CoFC dismissed the claim.

As small business contractors, we want to make the government happy by going "above and beyond." That doesn't, however, mean we have to do that for free. When directed to do extra work, make sure you take the steps to ensure you won't be out-of-pocket. **Reserve your rights, confirm extra work in writing, and make sure any direction comes from someone with proper authority. And always keep thorough records of any additional costs incurred.**

SBA OHA: KNOW WHEN THE CLOCK STARTS TICKING

In a recent decision, the SBA Office of Hearings and Appeals ("OHA") found that the size appeal clock starts ticking the day the SBA sends an email to a contractor, regardless of whether it reaches them.

Size Appeal of Ordnance Holdings, Inc., SBA No. SIZ-5833 (2017), dealt with a size protest filed by Ordnance Holdings, Inc., which challenged the size status of FPM Remediations, Inc. The SBA Area office had determined that FPM was a small business.

On March 30, 2017, the Area Office sent a copy of the determination to Ordnance by certified mail and email. The certified mail was eventually returned to the SBA Area Office as "Unclaimed." The Area Office then re-transmitted the decision to Ordnance via email on May 9, 2017. On May 10, Ordnance filed a size appeal with OHA. However, OHA found that the appeal was late, as it had not been filed within 15 calendar days after receipt of formal size determination.

Even though Ordance claimed it did not receive the determination until May 9, 2017, the dismissal reinforces an old adage: the clock starts ticking once the government uses a reasonable means to transmit a relevant communication, and the contractor bears the responsibility of providing accurate contact information and checking its inbox.

CONTRACTOR RECOVERS $31,000 IN FEES FOR $6,000 CLAIM

Sometimes it's all about the principle. That's what makes us spend time arguing with our bank over an unfair maintenance fee. Even though our time wasted on the phone is worth more than the twenty dollars we recoup, we do it because we want validation that we're right.

In a recent Civilian Board of Contra Appeals ("CBCA") decision, a contractor took this principle to a whole new level, spending $31,000 in attorneys' fees to prosecute a claim worth only$6,000. *Kirk Ringgold*, CBCA 5772-C (2017). Upon the agency admitting that he was indeed owed the $6,000, the contractor filed a claim for attorney fees under the Equal Access to Justice Act, which the CBCA granted.

This appeal involved a contract between Mr. Ringold (individually), and the USDA. Under the contract, the agency rented Mr. Ringgold's property to use as a helipad during a forest fire. Afterward, the agency "refused, for two weeks, to take responsibility for restoring the Ringgolds' property to its original condition."

Mr. Ringgold submitted an invoice for 15 days of holdover rent, in the amount of $6,000. The USDA refused to pay, and Mr. Ringgold eventually filed an appeal with the CBCA (viewing the non-payment of the invoice as a "deemed denial").

Incredibly, despite the clear terms of the contract and the small dollar amount involved, the USDA continued to push back at the CBCA level. Rather than settling the matter or resorting to alternative dispute resolution, the USDA allowed the appeal to get all the way to the briefing stage (the later stages of an appeal, after which considerable time and expense has been expended). However, eleven months after the dispute arose, and three months after the appeal was filed, the USDA agreed to settle for the full amount claimed. Mr. Ringgold then filed a request for attorneys' fees and expenses under the Equal Access to Justice Act, which included more than 200 hours of attorney work.

The CBCA wrote that the initial denial of Mr. Ringgold's invoice was "unreasonable and unjustified." Further, once the appeal was filed, the USDA made "substantially unjustified objections to jurisdiction and liability," thereby "forc[ing] Mr. Ringgold's lawyers to brief these points." Although the USDA ultimately agreed to settle for the full amount, this didn't eliminate the costs Mr. Ringgold had already incurred because of the agency's unreasonable conduct.

Thirty-one thousand dollars in fees! What if he hadn't won? More power to Mr. Ringgold, but that sure is a lot of money on one fight.

VA INSTITUTES PUBLIC SHAMING OF DISCIPLINED EMPLOYEES

On July 7, VA Secretary David J. Shulkin announced that the VA is taking a further step on transparency and accountability as a follow-on to the VA Accountability and Whistleblower Protection Act signed by the president less than two weeks ago.

Beginning today, the VA is making public a list of adverse employee actions taken since Jan. 20. This information will be updated weekly, with the most current list available at: https://www.va.gov/accountability/Adverse_Actions_Report.pdf.

Secretary Shulkin pointed to the move as another step in long-sought transparency and accountability actions at VA, and noted that VA is the first federal agency to make such data public. "Under this administration, VA is committed to becoming the most transparent organization in government," Shulkin said. "Together with the Accountability bill the president signed into law recently, this additional step will continue to shine a light on the actions we're taking to reform the culture at VA.

The list includes terminations, demotions and suspensions over 14 days since the new administration came into office Jan. 20. Additional categories of accountability actions will be included in upcoming releases.

For more information, visit the VA's press release at: https://www.va.gov/opa/pressrel/pressrelease.cfm?id=2927.

FOUR BILLS THAT AFFECT NVSBC MEMBERS

As mentioned on page one, four new bills were recently introduced in Congress that directly impact SDVOSBs and other small business contractors doing work with the federal government. In a nutshell, here's the 411 on these bills:

H.R. 2749 (Protecting Business Opportunities for Veterans Act of 2017). If passed, this bill would require the VA, in administering Vets First, to identify and penalize those who violate the limitations on subcontracting rule. The bill would clarify the performance expectations for Vets First contracts, and also require the VA to establish a system to enforce compliance and refer all violations to the VA's Inspector General. If the Inspector General finds that there was not in fact "good faith" compliance, administrative and criminal penalties may be imposed, including debarment.

H.R. 2006 (VA Procurement Efficiency and Transparency Act). This bill would require the VA, with respect to any VA contract that is reported in the Federal Procurement Data System, to record the amount of any cost or price savings realized by using competitive procedures in awarding such contract. It would also mandate the VA to make available and use on a VA-wide basis the standardized procurement templates used by the Central Office of the VA, the Veterans Health Administration, the Veterans Benefits Administration, and the National Cemetery Administration, allowing such templates to be customized to address particular procurement situations.

H.R. 2781 (Ensuring Veteran Enterprise Participating in Strategic Sourcing Bill). This bill addresses the VA's circumvention of the *Kingdomware* decision by using government-wide contract vehicles such as GSA schedules with low VOSB participation (enabling it to argue that it need not set the opportunity aside for VOSBs because the "Rule of Two" is not met). This bill would curtain this practice by requiring the VA to determine which procurement vehicles awarded under the Federal Strategic Sourcing Initiative ("FSSI") do not have at least two VOSB contract holders. Subsequently, for each such contract, the bill would require the VA to either (1) work with GSA to increase the number of VOSB contract holders to at least two, or (2) stop awarding orders under that category of the FSSI. In addition, the bill would require the VA to submit a certification to Congress that each VA contract awarded under the FSSI has at least two VOSB contract holders. In short, the bill would direct the VA to only make awards under the FSII where the "Rule of Two" can be satisfied.

Draft Bill (No Number Assigned): Improve Hiring & Training of VA Acquisition Work Force. This bill would require the VA to implement training curricula and covered certifications for VA employees, as well as prioritize the use of acquisition internship programs to hire employees to entry-level positions relating to acquisition in the VA. It also requires the VA Secretary to develop a plan to reduce duplication and to increase efficiencies with respect to the acquisition functions of the VA, with an emphasis on procurement and logistic functions. Note, however, that the bill's language is "soft," requiring the VA Secretary to implement policies and plans to meet its goals and giving him considerable time to do so.

FIRST CALL

The NVSBC is pleased to offer "First Call" to its members. In our active duty careers, "first call" was the notice to get up and get moving to usher in a new day. We will provide you with all the important information you need to get up and moving to success in the federal marketplace. This publication is prepared with the help of veteran advocate and attorney, Sarah Schauerte. Access her company website and blog at: http://www.legalmeetspractical.com.

Ideas?

If you have ideas for future content for First Call, or how to maximize the benefit NVSBC offers to its members, we always welcome input. Please contact Scott Denniston with your comments at: scott.denniston@nvsbc.org.