



# FIRST CALL

[www.nvsbc.org](http://www.nvsbc.org)

## Update from NVSBC

*A message from NVSBC Executive Director, Scott Denniston*



THANK YOU to all who attended VETS 17! (Pictures are showcased in this issue of *First Call*). The attendance was even higher than last year, and the feedback enthusiastic. We found that those of you who attended our boat cruise had a wonderful time cruising the waters of Norfolk while catching up with other members. Our keynote speaker, First Sergeant Matt Eversmann (Black Hawk Down), roused the crowd. We also appreciated our back-and-forth with VA OSBDU Executive Director, Tom Leney and NVSBC member and attorney Sarah Schauerte Reida, as they examined facets of the CVE's verification program.

Those who attended will be receiving a questionnaire asking for an honest critique of the event. Please be honest with your comments. We can't make VETS 18 better if we don't have your input! If you have a suggestion for a

learning session, we absolutely want to know what it is.

Thank you to those who participated in the scholarship program by purchasing T-shirts. We have some if you are interested, and you can also contribute to the fund at [www.nvsbc.org](http://www.nvsbc.org).

We will be starting the "Communications Campaign" in earnest next month. As I discussed at VETS 17, your participation is very important. Please play a role by: being a spokesperson, contributing money (again, at [www.nvsbc.org](http://www.nvsbc.org)), or by providing examples of agencies not supporting SDVOSBs/VOSBs, especially the VA.

On behalf of the entire NVSBC Board, we wish you and your families a safe and happy summer in 2017!

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



Top left, Eric Dailey and his daughter Krystal Martos pose in front of the intrepid American Rover; bottom right, Tom Leney and Sarah Schauerte Reida at our CVE Town Hall.

## It's Official: Vets First Trumps AbilityOne

According to the U.S. Court of Federal Claims, the VA cannot buy products or services using the AbilityOne List without first applying the "Rule of Two" and determining whether qualified SDVOSBs and VOSBs are available to bid. In other words, VOSBs take precedence over those on the AbilityOne List.

The [Court's decision](#) involved an apparent conflict between two statutes: the Javits-Wagner-O'Day Act, or JWOD, and the Veterans Benefits, Health Care, and Information Technology Act of 2006, or VBA. The VBA states that (with very limited exceptions), the VA must procure goods and services from SDVOSBs and VOSBs when the contracting officer has a reasonable expectation of receiving offers from two or more qualified veteran-owned companies at fair market prices. The JWOD predates the VBA and provides that government agencies, including the VA, must procure certain products and

services from designated non-profits that employ blind and otherwise severely disabled people (on the "AbilityOne List"). While after [Kingdomware](#), there was confusion as to which statute took preference – JWOD or VBA – a bid protest filed by SDVOSB contractor, PDS Consultants, Inc., has finally resolved this issue in favor of veteran-owned businesses.

As background, the NVSBC has been following this case since last September, when PDS filed the case as a bid protest, arguing that it was improper for the VA to obtain eyewear in all four VISNs without first applying the rule of two.

The VA initially defended the protest by arguing that AbilityOne was a "mandatory source," and that when items were on the AbilityOne List, the VA could (and was encouraged

to) buy them from AbilityOne non-profits instead of SDVOSBs and VOSBs.

But in February, just two days before oral argument was to be held, the VA switched its position, agreeing to apply the Rule of Two "if the item was added to the List on or after January 7, 2010" (the date the VA issued its initial regulations implementing the VBA). For items added to the AbilityOne List *before* that date, however, no Rule of Two analysis would be performed.

Maybe the VA banked on PDS dropping its lawsuit after conceding a partial win, but this didn't happen. PDS pushed forward, and the Court found the VA was always required to perform its Rule of Two analysis.

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## WHEN IT COMES TO SIZE, YOU CAN'T STEP OFF THE SCALE



At VETS 17, NVSBC board members Heidi Gerding and Scott Denniston present the Gordan Mansfield award to Dr. Ray Jardine. Dr. Jardine was recognized for owning and operating a successful small business, providing employment opportunities to veterans and giving back to the veteran community in a substantial and continuous way.

As small business contractors know, size is determined by looking at receipts over the last three fiscal tax years. Notice there's a period at the end of this sentence. You cannot fudge your size by delaying filing your last fiscal year's tax returns, which was confirmed [by a recent Small Business Administration Office of Hearings and Appeals decision](#).

In *Size Appeal of: Teracore, Inc.*, a size protest followed an award of a small business set-aside, and the SBA area office asked the awardee to produce its tax return for 2013 even though it had not yet been filed at the time of its 2014 offer. (If you're confused by that date, it's because it took the agency over two years to award the contract). The SBA OHA confirmed that this request was proper and that the awardee's size should be calculated by referring to its 2011, 2012 and 2013 tax returns (i.e., the last three years prior to its offer, where it self-certified as "small").

The lesson is simple: you cannot escape your true size by not filing last year's taxes. Your size is based on your last three fiscal years, period, and filing an extension won't change that.

## LATE PROPOSAL? IT'S PROBABLY YOUR FAULT

Western Star Hospital Authority, B-414216.2 (May 18, 2017) involved an Army RFP for emergency medical services. The RFP required that proposals be submitted via email no later than 4:00 pm., EST on January 30, 2017.

The RFP incorporated FAR 52.212-1 (Instructions to Offerors-Commercial Items). Paragraph (f)(2) of that clause provides that any “offer, modification, revision, or withdrawal of an offer received at the Government office designated in the solicitation after the exact time specified for receipt of offers is ‘late’ and will not be considered.”

When the protestor submitted its proposal, it did so in multiple parts and well before the specified deadline. Because of email server issues - whether the protestor’s, or the Army’s, the GAO does not know - its proposal did not reach

the Army until several hours after the proposal deadline.

Although the protestor and the Army quibbled over whose server had caused the proposal to be received after the deadline, the GAO did not seem to care about the answer: “[we] have repeatedly found that it is an offeror’s responsibility to ensure that an electronically submitted proposal is received by—not just submitted to—the appropriate agency email address prior to the time set for closing.” Because Western’s proposal “was not received at the agency’s servers until after the deadline for receipt of proposals,” it was late.

This decision follows the basic trend of the GAO and the Court of Federal Claims holding that ultimately, the duty to make sure a proposal is received on time rests on the shoulders of the contractor. While narrow exceptions are recognized - for example, in one case, a proposal was not found late when it was appropriately delivered per solicitation instructions but not time-stamped due to government

inaction; and in another case, a proposal was not late when it was not delivered in time due to severe weather that resulted in government shutdown and the closure of the building to which the proposal was to be delivered - these are few and far between.

This case, and even those where the protestor prevailed, underscores the importance of making sure a proposal (or a protest) is received on time. When you submit such an important document, **make sure you confirm receipt**, either through a “read receipt” via your email server or by requesting a quick acknowledgment of receipt by the contracting officer. It’s an additional step that requires little time and saves you considerable time, expense, and headache in the future by avoiding a rejected submission. And here, this poor contractor was just trying to get the Army to look at its proposal.

## The 2017 Federal Agency Small Business Scorecard



In our exhibit hall, VETS 17 attendees networked, showcased their abilities to procurement officials and prospective teaming partners, and enjoyed a happy hour.

Via a [press release issued on May 18](#), the SBA announced that the federal government "reached its small business contracting goals," awarding 24.34% in federal contract dollars to small businesses totaling \$99.96 billion, an increase of over \$9 billion from the previous year. However, if you take a look at the chart they released, it paints a different story. Check out the entries for HubZones and WOSBs:

Categories	Goal	2016 %	2016 \$	2015 %	2015 \$	2014 %	2014 \$	2013 %	2013 \$
Small Business	23.00%	24.34%	99.96B	25.75%	90.7B	24.99%	\$91.7B	23.39%	\$83.1B
Small Disadvantaged Business	5.00%	9.52%	39.13B	10.06%	35.43B	9.46%	\$34.7B	8.61%	\$30.6B
Service Disabled Veteran Owned Small Business	3.00%	3.98%	16.34B	3.93%	13.83B	3.68%	\$13.5B	3.38%	\$12.02B
Women Owned Small Business	5.00%	4.79%	19.67B	5.05%	17.81B	4.68%	\$17.2B	4.32%	\$15.3B
HUBZone	3.00%	1.67%	6.86B	1.81%	6.42B	1.82%	\$6.97B	1.76%	\$6.2B

## LOS CHANGES: ARE YOU (STILL) COMPLIANT?

A year ago, the SBA published a rule holding that the new standard for compliance with the limitations on subcontracting requirements is the *amount paid by the government*, not the *cost of personnel* (fully burdened direct labor rate). Also, in July of 2016, the VA [issued a memorandum](#) noting that from now on, it would be applying the SBA's new rule (amount paid, not cost of personnel), and would later amend the VAAR to reflect this.

This change to the Limitations on Subcontracting ("LOS") clause has the potential to significantly affect small businesses seeking set-aside work from the government. After all, it is entirely possible for a company to be compliant under one clause but not another. For example, in a park mowing services contract, where securing expensive equipment is required, allowing the subcontractor to do that could be okay under the old rule (as it is not a *personnel cost*) but not the new one (if the cost is passed on to, and paid by, the government).

Some service contracts are less affected. For instance, if a contractor is performing an IT services contract, application of the standard may not have much of an effect because much of the cost of contract performance - and payment by the government - relates to the direct labor on the contract.

We are finding that many VA contracting officers do not know about this change or the class deviation that incorporates the new SBA changes into VA set-aside solicitations. This results in the old clause being included, rather than

the new one that should apply. ***As such, if you are pursuing a set-aside contract, check to make sure the right clause is being applied.***

Not only that, but know that this new rule does not apply to your contract retroactively. If your contract contains the 2009 (old) version of the LOS clause, that is the clause that will apply through the life of your contract. If the government audits you and claims the new clause applies, that is incorrect because: "In the absence of a contract clause that expressly authorizes the CO to revise, add, or delete a clause without the contractor's consent, any attempt to bind a contractor to a unilateral clause change would be a breach of contract." *See General Dynamics Corp. v. U.S.*, 47 Fed. Cl. 514, 544 - 547 (2000).

Protect yourself. Stay up to date on LOS requirements! Especially with the confusion within the government contract arena, it is important to stay proactive by knowing the standards that apply to your business and whether you can perform the required amount of work under contracts, as well as what you need to do to be compliant in terms of dividing the work and the expense. It may make a difference in whether you submit a bid (and whether you get in trouble if an auditor comes knocking).

### 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](mailto:scott.denniston@nvsbc.org).