

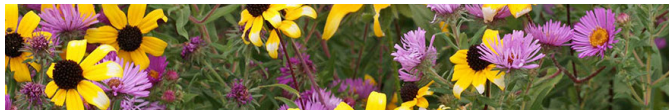


FIRST CALL

www.nvsbc.org

Update from NVSBC

A message from NVSBC Executive Director, Scott Denniston



I hope you are all enjoying your summer. THANK YOU to all who attended VETS 18 in Williamsburg, VA.

VETS 18 was an unqualified success! Williamsburg Lodge was a great venue with some nice touches that could only happen in Williamsburg. The learning sessions were very educational, as were the general sessions focusing on the latest trends in government contracting. Unfortunately many of the trends are not favorable to small businesses, especially veteran and service-disabled veteran-owned small businesses.

We will do our best to keep you updated, as we expect a busy rest of the year filled with plans, proposals, draft legislation, etc. We are aware it will also be busy for you as business owners, as we expect 40% of all federal contract dollars will be spent in the last quarter of the fiscal year. Get your summer vacations in early!

For those of you who attended the NVSBC annual members meeting during VETS 18, you know we've been busy! Chapters are growing! Advocacy has increased. We have some exciting additions to the website coming up in the education area. We are excited to have a full Board to kick off the year!

Welcome to our new NVSBC Board members: Troy Mizell, John St. Leger, Bill Dunn and Ed Tuorinsky. Also, our new officers starting on July 1st are as follows:

Eric Dailey: President
 Tim Farrell: Vice President
 Norris Middleton: Treasurer
 Bill Dunn: Secretary

I want to publicly thank Ed Jesson of OBXtek and Troy Mizell of AvKare, Inc. for their generous donations to the VETS scholarship fund during VETS 18. The money is still coming in, but we know it will be a record year.

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

NEW CONSTRUCTION INDUSTRY GROUP

The NVSBC has launched a Construction Industry Group aimed to enhance the VA's knowledge of how it can better utilize VOSBs in the construction industry. Mr. Tom Leney himself attended our meeting at VETS 18. If you'd like to be involved, email Sarah Schauerte at scs@legalsmeetspractical.com for more info.

Bad Faith Claims by Contractors Are Uphill Battles!

In general, we know that agencies have very broad discretion when acting in their official capacities. This includes in evaluating proposals for procurements, choosing requirements to fit an agency need, and otherwise carrying out their duties in their service to the American tax payer.

But what happens when an agency or official acts in bad faith in carrying out these capacities? If you are a contractor that believes your contracting officer or others has exercised “bad faith” in how they have treated you or taken action under your contract, what standard do you have to meet?

The Civilian Board of Contract Appeals addressed this inquiry. In *J.R. Mannes Gov’t. Servs. Corp*, CBCA 5638 (Nov. 21, 2017), the CBCA reviewed a contractor’s claim that the FBI had terminated its

task order in bad faith. The primary arguments were that the FBI wanted to “get itself a better deal by performing the work in-house,” or to retaliate against the contractor for a previous appeal.

In 2015, the FBI awarded a task order to J.R. Mannes to work on a project to administer user access to applications hosted on the FBI’s mainframe computer. By March 2017, the FBI planned to retire the system, so it concluded that the J.R. Mannes task order supporting the mainframe should be discontinued. Therefore, the contracting officer did not exercise the option year on the task order. J.R. Manne argued that the modification was a bad faith termination that would entitle it to its “anticipated profits.”

In finding that the FBI did **not**

act in bad faith, the CBCA wrote that “[t]he Government can terminate a contract for convenience when it is in its best interests.” There is a “presumption that government officials act in good faith.” To rebut that presumption and prove bad faith, a contractor must establish, **by clear and convincing evidence**, that a government official acted with “**some specific intent to injure the contractor.**”

Accordingly, if you believe your CO is “out to get you” and this has harmed you, be prepared to meet a high bar in taking legal action. “Clear and convincing” is a higher standard than most civil actions, and circumstantial evidence won’t cut it.

SAM.gov Relaxes Notarized Letter Requirement

As we’ve covered in *First Call* before, a recent hack to the SAM.gov system has resulted in GSA requiring that registrants submit a notarized letter from business owners formally appointing an “Entity Administrator” (to ensure that the individual registering the business has the authority to do so).

Now, due to the GSA’s significant backlog in processing these letters, the GSA is employing additional controls by the end of June. **First**, effective June 11, 2018, entities who create or update their registration in SAM.gov to apply **only** for federal assistance opportunities need not have an approved Entity Administrator notarized letter on file *before* their registration is activated. However, they still need to submit their letter within 30 days of activation. This same procedure will apply to all entities registering in SAM.gov as of June 29 (i.e., if you are registering in Sam.gov, your registration will be activated without the letter, but you still need to submit it within 30 days of activation). **Second**, SAM.gov is instituting a new log-in process as of June 29, 2018 as a measure to increase security and deter fraud. This means that when you go to log in to your SAM.gov account, your old user name and password will not work and you will follow prompts to create a new user name and password. Access further information [here](#).



Size Protest Illustrates Usable Small Business Principles

A recent size appeal before the SBA OHA illustrates a few principles we'd all be well-served to keep in mind. *Size Appeal of CopaSat, LLC* (May 31, 2018).

This size appeal started with an anonymous complaint to the SBA Office of the Inspector General hotline, where the tipster alleged that due to strong affiliation with a large company including mutual ownership and control, CopaSat should not have been able to claim "small" business status. No procurement was even on the line.

The SBA Area Office concluded that the tipster was in fact correct and issued a size determination holding that the two companies were affiliated due to common ownership and identity of interest. On appeal, CopaSat attacked the SBA Area Office's findings, and it also submitted as new evidence an Amended and Restated

Limited Liability Company Agreement which was not included in its submissions to the Area Office. In rejecting this new evidence, the SBA OHA noted that "OHA's review is based upon the evidence in the record at the time of the Area Office's determination unless a motion is filed establishing good cause shown." 13 C.F.R. 134.308. It also reaffirmed the determination on the two grounds found by the Area Office.

There are two takeaways here to highlight: **One**, know that we should always be vigilant about our size or socioeconomic status. It doesn't take an award for that to be called into question. **Two**, if you are responding to a document request from the SBA Area Office during a size determination process, be thorough (and make sure your documents are correct). If it makes an adverse finding and you have to appeal to the SBA OHA, you're stuck working with what the Area Office had to consider at the time.

NVSBE CONFERENCE CATERS TO CONSTRUCTION INDUSTRY THIS YEAR

As most of you know, every year the VA hosts its National Veteran Small Business Engagement, aimed at veteran-owned small businesses that desire to work in federal space. This year, the focus of the conference is a bit different, as the VA proposes to focus on opportunities within the architecture, construction, and facilities management industries. As such, the value for those in other industries may not be what it has been in prior years.

The conference will be held from October 31st to November 2 in New Orleans. Access the website [here](#).

ALL NON-VETERAN USER ACCOUNTS WIPED FROM NEW VETBIZ SITE

Effective June 22, the VA VetBiz website is located at <http://www.vip.vetbiz.va.gov>, which now features a new VetBiz portal and login system for users (the reason the system was recently down for 30 days). If you have a VetBiz profile, or you want to create one, you will have to follow the requisite steps in order to obtain a new one via either a DS Logon Registration (for veteran owners) or ID.Me (for non-veteran owners or representatives).



Here's the fun part: if you are not the veteran owner, you no longer have access to any accounts (whether it is just one, because you are a minority owner with representative status; or if you are a consultant who has a number of firms listed on your account summary). ***In order to get access, the veteran has to add you as a representative. Similarly, if you are a veteran who delegates the tedious VetBiz work to someone else, you must create an account and then give them access in order for them to complete any tasks.***

At this point, it is unclear whether, if you were already in the system, you will still receive alerts from the CVE. While a recent call to the CVE helpdesk relayed that such alerts came from the old system (which has been phased out), individuals have reported to NVSBC that they are still receiving alerts. Still, don't take a chance – if you are the veteran owner of a business in the VIP VetBiz registry, create your new account at <http://www.vip.vetbiz.va.gov> to make sure you stay on the grid.

SBA OIG Report: Agencies Receive an “F” in WOSB Sole Source Awards

In a [report released by the SBA OIG last week](#), contracting agencies were heatedly criticized for failing to comply with the requirements for awarding sole source contracts under the Woman-Owned Small Business (“WOSB”) Program. The potential cost of this mistake? \$52.2 million.

The requirements for awarding sole source contracts to WOSBs are set forth at FAR 19.1506. This provides that a contracting officer (CO) may award a sole source contract to an economically-disadvantaged WOSB, or EDWOSB, when: WOSBs are underrepresented in the applicable NAICS code, the CO does not have a reasonable expectation that offers would be received from two or more EDWOSB concerns, and the anticipated award does not exceed \$4 million (other than manufacturing). The requirements for sole source awards to WOSBs are the same, with the added requirement that WOSBs be *substantially* underrepresented.

If the SBA OIG report was to assigned a grade to COs for following sole source procedures, it would be an F. Of other findings, the OIG found that COs did not comply with sole source requirements for **50 out of 56** contracts. That's 11%!

The OIG report found that contracting officers awarded sole source contracts to WOSBs without the necessary documentation to determine eligibility for 50 of the 56

Program contracts they reviewed. Without this documentation, it was not possible to ascertain that a firm was owned and controlled by a woman who is a U.S. citizen. Specifically, contracting officers awarded 18 contracts, valued at \$11.7 million, on a sole-source basis, to firms that had no documentation in Certify.SBA.gov, and 32 contracts, valued at \$40.5 million, to firms that uploaded incomplete documentation. Compounding these issues, within these 56 contracts, the OIG found instances where contracting officers had awarded a contract using a NAICS code that SBA had not identified as being substantially underrepresented by women-owned businesses. Additionally, contracting officers awarded two contracts for NAICS codes that were identified by SBA, but the firms had not identified themselves as eligible small businesses for those codes.

As most are well aware, WOSBs are fairly underrepresented with respect to the receipt of set-aside and sole source contracts from the federal government. (This is reflected in [the small business scorecard the SBA released in 2018](#)). This underscores the unfortunate nature of the SBA OIG's findings, as it demonstrates that those lucky enough to receive a bit of the “WOSB federal pie” may not have been allowed to order from the menu in the first place.

Access the full SBA OIG report [here](#).

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.