



FIRST CALL

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Update from NVSBC

A message from NVSBC Executive Director, Scott Denniston



Last week the NVSBC was the **ONLY** veteran business organization invited by the House Veterans Affairs Committee to participate in a roundtable on “VETS First: A YEAR After *Kingdomware*.” In the company of organizations including the American Legion, Disabled American Veterans, Veterans of Foreign Wars, and Professional Services Council, NVSBC was represented by myself, Eric Dailey, Marc Goldschmitt, Mark Thomas, and Bob Minnick. The VA’s reps were Jan Frye, Phil Christy, and Rick Lemmon.

In a nutshell, the VA said all of their acquisition problems would go away if VETS First went away!

According to the VA, SDVOSBs/VOSBs are difficult to work with, bring little value to the table, and VETS First is burdensome. VA representatives also said they do not understand why they should buy from anyone other than the lowest cost vendor. Congresswoman Ann Kuster responded, “Perhaps because the law and Congress say otherwise.”

My biggest take-away from the roundtable is we, as VOSBs, have more allies in Congress than perhaps we thought. As you know, the NVSBC has been running a “Communications Campaign” on these issues since May, 2017. *We* have the legwork. We need all of *you* to step up and meet with your congressional delegations to hold VA accountable for implementing VETS First as Congress and the Supreme Court intended! **YOU** are the key to VETS First!

Congratulations to all who were awardees of the VECTOR IDIQ! NVSBC is forming a VECTOR Industry Group to work with VA to promote the use of VECTOR throughout VA. Most VA program managers are not aware of the advantages of the contract vehicle. We want to change that. If you are a VECTOR prime, please join this effort. Our kick-off meeting is October 26th in Fairfax, VA. If interested, please let me or Heather Hayes know. Heather’s email is heather.hayes@nvsbc.org.

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

NVSBC MEMBER RECEIVES TOP HONOR

San Antonio-based Indatatech was selected by the Minority Business Development Agency (Department of Commerce) as the Veteran Company of the Year! Mr. Bede Ramcharan will officially receive the recognition in Detroit at the National Minority Supplier Development Commerce. Congratulations, Indatatech team!

SBA OHA Might Soon Hear VA VetBiz Verification Appeals

A new proposed rule published in the Federal Register on September 28, 2017 provides procedures for appealing errors made by the VA during the VetBiz verification process. **Comments are due on October 30, and we encourage you to email yours to Scott Denniston at scott.denniston@nvsbc.org so we may send a consolidated, unified response.**

In a nutshell, the rule establishes that the Small Business Administration's Office of Hearings and Appeals ("SBA OHA") will have jurisdiction over appeals relating to the cancellation or denial of a business's inclusion in the VetBiz registry. However, there are two big point to consider: *one*, it is a *proposed* rule, meaning that nothing may come from it; and *two*, it requires an appellant to include a statement as to "why the cancellation or denial is in error." It is difficult to show objective "error" given that the regulatory

requirements are written so "gray" (i.e., generally).

Let's break down how you get standing to appeal. First of all, you must be subject to a cancellation or a denial. Cancellations are simple – that's when you get booted from the program because you no longer meet the eligibility requirements. A "denial," however, is trickier. Because the proposed regulation at 13 C.F.R. 134.1103 provides that only "denials" can be appealed, a business must choose to accept a denial (as opposed to taking the option of withdrawing) and then appeal the denial. If they lose, a six-month wait period applies.

Because the VA is accepting comments, consider noting that *appeals should not be limited to businesses that choose to accept denials, but to any business that*

receives a pre-decision or pre-determination letter finding it is ineligible for the VetBiz program.

Also, the appeals process doesn't address the big picture problems. For example, a business cannot *begin* the process if a 1% shareholder refuses to sign the 8077 form. Also, some businesses have to withdraw because the VA won't budge on the provision of a "required" document, even if another documents containing the same information is offered.

To read the rule in its entirety, find it on the Federal Register site [here](#). And please - if you have something to say (or an anecdote to share to illustrate your point) - speak up!

NVSBC D.C. Chapter Update

The D.C. Metro Chapter of NVSBC's SOLD OUT monthly dinner meeting on 12 October featured an exceptionally informative Special Guest Panel Discussion entitled "Upcoming Opportunities for SDVOSB/VOSB Firms in the New Fiscal Year." The panel was moderated by Stephanie Alexander, CEO of BOOST LLC and co-founder of govmates.com. The highly interactive discussion focused on acquisition trends, large IDIQs, GWACs, and opportunities across all agencies in the Federal government. A handout provided by the panelists detailed FY16 SDVOSB and VOSB Spending Trends, the Top 5 Friendly SDVOSB and VOSB Agencies, and Top 5 FY18 Opportunities for SDVOSBs and VOSBs. For a copy of this very informative briefing document, please contact scott.semple@nvsbc.org.

Stephanie Alexander & Katie Bilek, Vice Presidents of the D.C. Metro Chapter Matchmaking program, provided updates on the latest matches made with large primes and the schedule for upcoming MM activities including events with CapGemini, GDIT, Northrop Grumman and many other large primes. Go to **govmates.com** to learn more about our new matchmaking platform. The DC Metro MM program delivers REAL business opportunities for our members.

The D.C. NVSBC Chapter meets monthly on the 2nd Thursday of each month from September through June at the Key Bridge Marriot in Arlington, VA. Boot Camps are also offered each month at 4-5:30PM prior to the monthly dinner meetings. For event notices, check NVSBC.org.



DEFAULT TERMINATIONS: DON'T BE VULNERABLE

A recent Civilian Board of Contract Appeals (“CBCA”) decision presents a comprehensive breakdown of the rules for a federal agency’s issuance of a default termination. *Affiliated Western, Inc. v. U.S. Dept. of VA*, CBCA No. 4078 (2017).

In a case where the contractor sought to convert a default termination, the CBCA noted that default termination is “a drastic sanction which should be imposed (or sustained) only for good grounds and on solid evidence.” When a default is based on the contractor’s failure to prosecute the work, the contracting officer must have a reasonable belief that there was “no reasonable likelihood” that the contractor could perform the entire contract effort within the time remaining for contract performance. A termination for failure to make progress “usually occurs where the contractor has fallen so far behind schedule that timely completion

becomes unlikely.”

The VA had met its initial burden of proving that there were good grounds and solid evidence to support the termination. At that point, the burden shifted to the contractor to prove excusable delay by establishing three elements: “(1) the delay is of an ‘unreasonable length of time,’ (2) the delay was proximately caused by the Government’s actions, and (3) the delay resulted in some injury to the contractor.”

This case demonstrates how a contractor may be vulnerable to default termination: if you can’t show a reasonable likelihood that you can perform your contract within the time remaining, an agency’s decision to termination for default will be upheld. Don’t let that happen. Make sure you stay on top of deadlines and any responses to the agency, and be able to show that any issues with performance can be corrected by the end of the contract period of performance.

NVSBC Invited to Participate in Focus Group to Amend VA’s VetBiz Regulations (38 CFR Part 74)

On Friday, October 20th, several NVSBC members (including Scott Denniston, Marc Goldschmitt, and Sarah Schauerte), will be participating in a small, invite-only focus group held by the VA to discuss the new rules to govern the Veterans First Contracting Program (as required by the 2017 NDAA). This follows the VA’s recent withdrawal of its November 15, 2015 proposed rule due to “the nature of the adverse comments received.” Our participants will take detailed notes during the focus group and provide the main takeaways in the November edition of *First Call*. Stay tuned!

HAS YOUR NAICS CODE BECOME OBSOLETE?



Effective as of October 1, 2017, your NAICS code may not exist anymore.

The U.S. Small Business Administration (“SBA”) has updated its table of small business standards, adopting the U.S. Office of Management and Budget’s (“OMB”) North American Industry Classification System (“NAICS”) revision for 2017. NAICS 2017 created 21 new industries by reclassifying, combining, or splitting 29 existing industries under changes made to NAICS in 2012. SBA’s size standards for these 21 new industries result in an increase to size standards for six NAICS 2012 industries and part of one industry, a decrease to size standards for two, a change in the size standards measure from average annual receipts to number of employees for one, and no change in size standards for twenty industries and part of one industry.

While some of these NAICS codes are a bit obscure, it’s worth taking a look to see if your business is affected. This is also a reminder of the importance to make sure your NAICS codes on sam.gov and VetBiz.gov are updated! Check out the rule here.

TWO CASES ALL VOSBS SHOULD KNOW

The NVSBC keeps you updated on relevant case law! Here are two cases every VOSB should know about:

First, a recent Government Accountability Office (“GAO”) bid protest decision held that an agency isn’t required to cancel a small business set-aside if the agency learns that one of the small businesses upon whom the set-aside decision rested is no longer small, meaning that it does not anticipate the requisite number of offers under the “rule of two.”

In *Synchrogenix Information Strategies, LLC*, the FDA had issued a solicitation for software licenses, maintenance and support, and related services. Before issuing the solicitation, the agency had issued a request for information (“RFI”), seeking information from businesses regarding their interest in the procurement. B-414068.4. The FDA ultimately issued the solicitation as a total small business set-side because it found that it was reasonably likely to receive at least two or more offers from responsible small businesses. Between the time it made the set-side decision and when it issued the award, one of the two offerors outgrew the applicable size standard.

When the agency’s decision to continue to impose the small business size requirement was challenged, the GAO upheld this decision. It noted that if an agency’s market research is sufficient to justify a set-aside, the agency need not adjust its determination if it later realizes it will only receive *one* offer from a

qualified small business. Put simply, the “rule of two” only applies in the beginning of the acquisition process.

Second, an SBA OHA decision illustrates the need for VOSBs and SDVOSBs to know the differences in unconditional ownership requirements as they apply to the VA’s Veterans First Contracting Program versus the SBA’s SDVOSB Program. *Veterans Contracting Group, Inc.*, SBA No. VET-265. In a nutshell, the VA allows for transfer provisions that constitute “normal commercial dealings,” including right of first refusal restrictions. Meanwhile, the SBA’s regulations do not contain such language. This issue was also raised four years ago in a U.S. Court of Federal Claims (*Miles Construction*).

If a business’ bylaws or operating agreement do *not* provide for unrestricted transfers, it is worth re-reviewing this case law to make sure your business complies with applicable requirements for programs in which your business participates. Don’t miss out on an award due to a drafting issue!

SAVE THE DATE!

The NVSBC’s VETS 18 conference will be held in Williamsburg next year! Make sure you’re available from June 11th through the 14th.

Also, the next meeting for the D.C. chapter will be held on November 9. Please email Scott Semple at scott.semple@nvsbc.org if you would like to RSVP.

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.