



FIRST CALL

www.nvsbc.org

Update from NVSBC

A message from NVSBC Executive Director, Scott Denniston



Don't forget to brush your teeth this Halloween!

HAPPY HALLOWEEN SEASON TO ALL!

I want to address Election Day, 2018, not to influence your vote but merely to encourage you to VOTE! This is a fundamental right we as veterans fought for. It's now our responsibility to exercise that right. If you don't vote, you have no grounds for complaining!

I am saddened by the recent U.S. Court of Claims case, *Electra-Med, et al. v. U.S.* (No. 18-927C) (also analyzed on page four). In this case, the SDVOSB plaintiffs argued the VA's actions in modifying the current Med/Surg. Prime vendor contracts were illegal and would cause the plaintiffs irreparable harm. The VA's modifications basically turned over the acquisition functions to four profit-oriented prime vendors. The court found the modification illegal as an "end run" around CICA and violative of VETS First. However, the practical effect of the court's ruling was to allow

the VA to do as it wished, finding that veteran healthcare would be harmed if the VA could not continue with its modification. The potential ramifications for small business programs are great. If an agency successfully alleges that its mission will be harmed every time a small business challenges a decision not to set aside an opportunity, we might as well eliminate Part 19 from the FAR. In my opinion, the court did a great disservice to all small businesses.

I was however, honored to participate in the initial dinner meeting of the Colorado Chapter of the NVSBC last week in Denver. We had a good mix of folks from both Denver and Colorado Springs. We had great discussion on the history of the NVSBC and what it takes to have a successful chapter. Special thanks to David Waters for hosting the meeting. If you are interested in forming a chapter in your area, email me at scott.denniston@nvsbc.org.

CONTENTS



Update from NVSBC

1



SAM.gov Lapses Can Cost a Contract (Top)

Tampa Chapter Update (Bottom)

2



New VetBiz Verification Rules: The Mechanics (Top)

A Cautionary Tale: Think Before Throwing Stones (Bottom)

3



Case Shows Courts Down on *Kingdomware*

4

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

FREE WEBINAR ON LONG-AWAITED RULES CONSOLIDATING VA AND SBA SDVOSB ELIGIBILITY REQUIREMENTS

Interested in knowing how the new rules on SDVOSB/VOSB eligibility impact your firm? Jon Williams from PilieroMazzo, LLC is presenting a webinar hosted by the Veteran Institute for Procurement (in partnership with the Veterans Business Outreach Center) on **October 25** at 3:00 PM. Register here.

SAM.gov Lapses Can Cost a Contract

From time to time, the NVSBC receives an inquiry regarding the requirements for the timing of SAM.gov registration. We all know we must be registered, but does this have to be when we submit our bid, or are we fine so long as we do it before we're awarded a contract?

A recent update to the Federal Acquisition clarifies that contractors must be registered in SAM.gov **at the time of bid submission**, as clarified by a recent final rule that will become effective on October 26, 2018. This means that if you aren't in SAM.gov at the time you submit your bid, you've wasted your time because registration is an eligibility requirement.

Luckily, a registration on SAM.gov is one of the least painful processes we go through as government contractors. The initial process is a bit tedious and cumbersome, but once it's done, updating it is fairly simple with the exception of having to cycle through

all of the pages in order to submit your application. It's also important to do right, and not just because the government relies on the information provided when making an award: accuracy (to include reporting changes) is *required* under FAR Part 4.12.

So, don't drag your feet on SAM.gov registrations and updates – make it a part of your company practice to do them promptly and thus save yourself a potential headache when you're scrambling to do it/complete updates when also juggling a big proposal.

Also, as you might know, due to a hack of the SAM.gov system, the GSA implemented a requirement that firms submit a notarized letter before the activation of a registration. Due to backlog in processing the letters, the requirement was changed to after submission, and that rule remains in effect. Access more details here.

MAKE USE OF MEMBER RESOURCES!

Here are some resources that may interest you:

Plagued by technical issues in utilizing the new VetBiz system? Email Sarah Schauerte at scs@legalmeetspractical.com for workarounds and to report any issues the VA should address. (She is participating in a focus group, where the VA is requesting input as to system issues it must fix).

The NVSBC construction industry group is growing, adding more members and looking forward to using the experience at the VA's NVSBE to identify opportunities for VOSBs and SDVOSB construction firms. Email William Thomas at dbl2rt@gmail.com for further details.

Tampa Chapter Update

This month on October 4th, the Tampa Bay NVSBC chapter hosted Mr. Thomas J. Leney, the Executive Director of Small and Veteran Business Programs at the VA. His candid presentation on how to position yourself for procurement opportunities in the federal and commercial market place was well received by a record gathering of 85 attendees! Small business professionals from PTAC, MacDill 6th Contracting Squadron, and Turner Construction were also present at the event.



Our Nov 1st dinner will feature Kathleen Wolf, who will present "Government Contractor Growth and Cash Flow dilemma". As part of the Solvability team, she educates GovCon on best practices for accounting, compliance, and organizational structure. Tickets are available now at: <https://www.eventbrite.com/e/nvsbc-tampa-bay-dinner-meeting-tickets-51467159660>.

To be added to our distribution list on upcoming events please email Lynette Planto at lynette.planto@nvsbc.org. Also, as always, if you are too far to travel to specific chapter events, feel free to request presentation slides and any resources made available by reaching out to the chapter head/point of contact.

New VetBiz Verification Rules: The Mechanics

On September 24, the VA published in the Federal Register those amendments to its regulation at 38 CFR Part 74 which affect the process of verifying VOSBs and SDVOSBs as eligible for VA set-aside contracts. The rule clarifies many definitions regarding the process, **adopts the SBA's eligibility requirements (now revised)**, and implements appellate procedures.

While there are many substantive changes to the verification procedures, here are several:

First, the rule provides that the verification period is now three years, not two (38 CFR 74.15).

Second, an applicant may appeal the CVE's decision to *deny* an application by filing an appeal with the SBA OHA (38 CFR 74.13).

Third, a participant whose verified status has been *cancelled* may appeal this decision to the SBA OHA (38 CFR 74.12).

Fourth, a participant "must inform CVE of any changes that would affect its eligibility within 30 days." 38 CFR 74.15. Along with implementing a shorter time period for reporting changes (previously 60 days), this language is arguably broader than that previously used in approval letters. This referred to reporting changes that would "adversely affect" eligibility, where one could make the good faith argument that because a given change did not *adversely* affect eligibility, it need not be reported. This new language, however, seems to imply that all changes should be reported so long as they bear on eligibility. (This would enable the CVE to determine whether they raise an issue or not).

As it relates to this particular rule, better safe than sorry – initiate a change request and have the CVE decide whether it needs more information as to the reported change. You'll have a written record of having done your due diligence, and chances are good that the CVE won't ask for additional information.

Fifth, the CVE now has an enumerated list of those documents it may require in assessing eligibility for VetBiz verification. Among other documents, these include financial statements, lease and loan agreements, certificates of good standing, and voting records. (These are mentioned here because in general, these are absent from the list of required documents the CVE has utilized in the past).

Sixth, the SBA, not the VA, determines affiliation. When assessing an application, the VA will not make a determination of whether a firm is affiliated with another (though, of course, a relationship might affect a veteran's ability to "control" his firm).

The devil's in the details, so know if a tweak or change impacts you. Take a look at the rules as revised here.

Are You Still Eligible for SDVOSB Set-Asides?

A rule consolidating the VA's and the SBA's eligibility provisions to qualify as an SDVOSB or VOSB kicked in as of October 1, and a companion rule revised these provisions. These replace the old VA and SBA rules, which separately defined how a veteran can "own" and "control" his business, implementing numerous substantive changes. **Accordingly, you might want to consider revisiting your corporate documents and company practices to ensure your firm continues to meet the requirements.** You don't want to wait until a status protest to find that it doesn't. In addition to other changes, the new rule: does away with community communications; specifies that the company's highest officer position must generally be the highest compensated; clarifies ownership requirements; and allows exceptions of "extraordinary circumstances" to veteran control over company decisions.

At least you no longer need to worry about any nuances between the SBA's rules (which apply to all agencies but the VA) versus the VA's rules. Before, the various nuances created considerable confusion, particularly with the VA's unique allowance of a right of first refusal when it came to the veteran's right to transfer his interest. As the CoFC held in *Miles Construction*, this was acceptable as a "normal commercial practice," which was permitted by the language in the VA's regulation at 38 CFR 74.4. Because the SBA's rule didn't contain a similar qualifier, however, having a right of first refusal provision would render a firm ineligible as an SDVOSB (and did in that case). Now, the consolidated rule permits rights of first refusal by containing the "normal commercial practices" language.



Case Shows Courts Down on *Kingdomware*

Most everyone involved with the NVSBC is familiar with the *Kingdomware* decision, where the Supreme Court affirmed that the VA must set aside FSS contracts for VOSBs/SDVOSBs when certain conditions are met. Since that time, as we've kept you informed, the veteran business community has worked hard to ensure that the VA is held to the standard confirmed by the highest court of the country. Recently, however, a federal judge effectively criticized the "Rule of Two" confirmed by *Kingdomware*, hinting that Congress can (and should) correct the law due to the strain it places on the VA.

In *Electra-Med Corp. v. U.S.*, COFC No. 18-927C (2018), a contractor protested the VA's choice to outsource the selection of certain medical supplies to prime vendors participating in the Medical-Surgical Prime Vendor Next Generation (MSPV), citing difficulty in finding items necessary to support its healthcare network. It issued a Class Justification and Approval to allow these prime vendors to modify the process of creating a Master List of healthcare items and selecting the items on this list.

In his opinion, Judge Bruggink of the CoFC ruled that under the law, the veteran plaintiffs were right on the merits. However, he declined to enter an injunction to prohibit the VA from its chosen practice, citing the public interest in ensuring high quality healthcare to veterans. He also stated:

The bevy of protests filed in this court and at the GAO since the Supreme Court's decision in Kingdomware are evidence

enough that these requirements are strict and difficult to follow in the mean and no doubt doubly so when the law requires that they be applied without fail or exception. And yet the law remains. Only Congress has the kill switch.

This opinion language, along with other cites (such as referring to the VA as being "hamstrung by the myriad requirements and preferences [imposed on it by *Kingdomware*]") makes it clear that Judge Bruggick knows that he reached the legally correct decision, but that he was not happy doing so. In referring to Congress as having the "kill switch" on the *Kingdomware* preference, he highlights once again that while the veteran business community has won the battle on the Rule of Two, that doesn't mean the war is over. Congress could still amend the pertinent regulation in order to do away with this preference.

Whether this is likely to happen is doubtful. The principles at play in *Kingdomware* have been known by Congress for several years – ever since they were raised in the first GAO decision. If Congress wanted to change the regulatory language at issue, it could have done so at any time. Meanwhile, some years ago in 2009, the GAO found that a HUBZone preference was mandatory based on very similar language. (*Mission Critical Solutions*, B-401057). In response, Congress quickly stepped in and revised the language. Chances are, if Congress hasn't fixed the *Kingdomware* "problem" yet, it's not going to. But that doesn't mean the problems with forcing the VA to adhere to it will end.

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.