



FIRST CALL

www.nvsbc.org

Update from NVSBC

A message from NVSBC Executive Director, Scott Jensen



As we roll into October, we can all agree that this has been a tumultuous year! So much disruption to our businesses, lives, and families at times makes it difficult to see the good things around us. As I reflect on my first two months at NVSBC, I see great things happening and am very excited about the great things to come.

Members are engaged. Helping each other solve problems and advance business needs is a hallmark of this organization. We see this every day! If you have a question, concern, or need, let us know and we will find the right person to help. Let us, on your behalf, activate our vast network of federal leaders, partner associations, business leaders, and fellow members to help you.

We hated that VETS 20 could not happen this year! But in its place, our weekly webinar series, Virtual Vets 20, has offered the information, training, and support our members need.

No doubt that the wheels of government have also continued to turn! We are actively engaged in providing member-informed input into these activities, including the development of CMMC oversight and the progress of the NDAA.

As we face the close out of the year, please join us virtually for our annual membership meeting on October 29th and our virtual Champion Awards Celebration on November 5th. Both events will allow us to become better acquainted!

We continue to monitor developments on the hill and in the administration as the election results and their impact on veteran business become clearer. We are doubling down on creating more opportunities for member interaction by introducing new features on our website and also refining our coaching and mentoring programs. And we will be introducing a new stand-alone webinar program to sustain the support and success of Virtual VETS 20 (which we are hoping to follow with an in-person conference, most likely in the November 2021 timeframe).

To continue to deliver high quality programs and support to our members, we are implementing a long overdue yet modest membership fee increase beginning in January of 2021. **Anyone who renews their membership for 2021 prior to January 1st, 2021 will pay the existing fee and be covered through the end of 2021.** Please consider renewing early!

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

UPCOMING NVSBC EVENTS

- 29 September - Virtual VETS'20 - U.S. Air Force SBIR/STTR Program
- 30 September - NVSBC's CMMC Panel Discussion
- 6 October - Virtual VETS'20 - U.S. Department of Energy's National Laboratories
- 13 October - Virtual VETS'20 - VETS2 GWAC
- 20 October - Virtual VETS'20 - Federal Procurement Data Diving: How to Go for the Gold

***Visit nvsbc.org/events for further details!**

Cautionary SBA OHA Decisions For VOSBs

It's gotten a lot better to go through the VA's verification process for purposes of participating in the VA's Veterans First Contracting Program. For those who have trouble, however, and find themselves facing denial (real denial, not the state of), the takeaway from these cases might come in handy:

First, if a firm is denied verification to the VA's VetBiz Vendor Information Pages, that firm must file its appeal not with the VA, but with the SBA Office of Hearings and Appeals. The (hard) deadline to do so is 10 business days. *Starblast, Inc.*, SBA No. CVE-164 (2020). Even if a firm relies on erroneous advice from a VA employee (like Starblast alleged here) and informed the VA of its appeal within the required ten-day limit, that will not excuse late filing to the SBA OHA. Even if the reason for tardiness is ironclad, the SBA OHA does not have discretion to waive its deadlines, so there's no point in even trying. See 13 C.F.R. § 134.202(d)(2).

In the case illustrating this point, on June 3, Starblast received a denial letter from the VA's CVE. It included boilerplate language advising Starblast that any appeal was required to be filed with SBA OHA within ten business days. The letter did not advise Starblast how to do this, and upon seeking guidance from the CVE, Starblast was told to email the appeal to vip@va.gov and verificationfollowup@va.gov. Long story short, Starblast eventually figured out this was the wrong route to go, appealed to SBA OHA, and was booted because its appeal had not been filed there within 10 business days.

Second, when you file an appeal of a denial for Inclusion in the VA's Vendor Information Pages, include a copy of your denial. This is required by 13 C.F.R. § 135.1105(a). In another SBA OHA case, even though a contractor had timely appealed within 10 business days, it forgot to include its denial letter. As such, the SBA OHA dismissed the

appeal. No further analysis was provided in this extremely short decision. *Joy Corporation*, CVE-155-A (2020).

If you are denied verification, a six-month wait period applies. Some folks choose to wait it out and calibrate their structure or operations to ensure they've corrected the issue the CVE found to be an insurmountable hurdle for eligibility. If you truly believe a mistake has been made, however, and you want to take it up with the SBA OHA, don't get tripped up by a technicality!



The SBA Small Business Scorecard: Grading On a Curve?

The Small Business Administration (SBA) recently issued its [government-wide Small Business Procurement Scorecard](#), which measures federal agencies' award of procurement dollars to contractors that fit into small businesses socioeconomic categories (small business, WOSB, small disadvantaged business, SDVOSB, and HUBZone). In all, the SBA affixed a blinding gold star to the scorecard, assigning an overall grade of "A" at 108.34% (when measuring performance against the statutory goals set at 15 U.S.C. § 644(g)).

However, one should keep in mind the relatively low percentages to which federal agencies are held. For example, the goal of total contract/subcontract value awarded to SDVOSBs is 3%. Considering the number of responsible SDVOSBs that could perform federal work, is exceeding the 3% goal (at 4.39%) that difficult? Is there more that could be done to award work to SDVOSBs?

At any rate, the good news is the scorecard reflects that federal agencies are doing what they are required to do with respect to ensuring there are contract opportunities available to small businesses. Agencies exceeded their goals in all categories except one (HUBZone). On our end, to ensure that agencies maximize opportunities to SDVOSB, make sure you are responding to sources sought notices to confirm interest/availability. If an agency does not know there are SDVOSBs that can perform a certain contract, it has no reason or requirement to set it aside.



Cure Your Incumbent-Itis!

In *XTec, Inc., B-418619 (July 2, 2020)*, the GAO rejected an incumbent’s assertion that an agency erred in assessing technical weaknesses that were at odds with the agency’s purported familiarity with XTEC’s work on the incumbent contract. The GAO decision reflects the effects of “*incumbent-itis*,” even if an agency is aware of exemplary performance, if that is not also reflected in a well-drafted proposal that effectively responds to the solicitation, an incumbent can lose the follow-on contract. An agency can only judge the four corners of a proposal.

Per the GAO’s description, “XTEC challenged the agency’s evaluation in almost every respect.” The GAO found all of XTEC’s objections without merit. The GAO noted the XTEC challenged many of the agency’s identified weaknesses and concerns as unwarranted given the agency’s familiarity with XTEC’s solution from the incumbent contract. For example, the agency

expressed confusion as to whether a certain card processing workflow was already implemented or was being proposed as an enhancement. XTEC’s response was effectively that because it was already performing the contract, the agency should have known the answer.

The GAO clarified that a “technical evaluation is dependent on the information furnished” in the bidder’s proposal. Thus, despite the agency’s familiarity with XTEC’s solution, it was the contractor’s responsibility to “submit a well-written proposal, with adequately detailed information” to demonstrate compliance with the solicitation and permit a meaningful review by the procuring agency. In other words, even if an agency should know that as the incumbent, your company is equipped to do the best job on the successor contract, your proposal must be responsive, clear, and detailed. A source selection board looks at proposals, and if you’re the best one for the job, that proposal must show that or downgrading is warranted (and, most likely, required).

UPCOMING NVSBC EVENTS

September 30, 11:30 AM – 12:30 PM EST
CMMC Panel Discussion
 Registration
 Link: <https://attendee.gotowebinar.com/register/8289849691106443532>
 NVSBC Members \$10 - **NVSBC Member Discount Code: NVSBCMBRCMMC**
 NVSBC Strategic Partners: \$20
 Non-Members: \$30

October 29, 1:00 – 2:30 PM EST
Annual NVSBC Membership Meeting - FREE
 Meet the new director, new board members and see where NVSBC is heading in the next year!
 Link: <https://attendee.gotowebinar.com/register/1410187843965690128>

November 5, 1:00 – 2:30 PM EST
Champions of Veteran Enterprise "Virtual" Awards Ceremony - FREE
 Please join us to present our awards to our Primes and Agencies that met the 3% SDVOSB goal and/or the 8% VOSB goal for FY 2019, as well as our 2020 Gordon Mansfield winner.
 Registration
 Link: <https://attendee.gotowebinar.com/register/4177889508528726284>

certify.SBA.gov Needs Work, Report Says

For those of you participating in the SBA’s 8(a), WOSB, or All Small Mentor Protégé Programs, you have already dealt with the online platform of certify.SBA.gov. While you may have encountered some user issues, a [recent Office of Inspector General report](#) examines in depth those issues caused for the government officials on the back-end. Contractors may not experience these personally, but they do experience the results: for example, the average number of days to approve 8(a) participant applicants increased from 91 days in FY 2017 to 138 days in FY 2019.



Further, as of August 2019, “only 20 percent of the All Small Mentor-Protégé Program’s certification process had been implemented in Certify [and] the application was missing basic functionality, including notifications, application routing, communication with applicants, and reporting.” Also, although HUBZone applications were supposed to be added to Certify soon after it was introduced, “to date, SBA has not implemented a HUBZone application in Certify,” instead relying on a legacy application system that “no longer met the business requirements of the HUBZone Program as far back as 2010.” (If any of you has used this, it does look like something from the days of Atari).

All in all, the OIG had nine recommendations to improve Certify, noting that Certify has an 11-year project lifestyle cost estimate of \$45 million. We will see where this is in a year . . .

GAO DECISION PROVIDES GUIDANCE IN TIERED SOLICITATIONS UNDER *KINGDOMWARE*

The GAO's decision in *Bluewater Management Group, LLC, B-418831* (Sept. 2, 2020) involved a VA solicitation seeking offsite lodging for students at the VA law enforcement training center in Little Rock, Arkansas. The solicitation was issued as a tiered set-aside (with SDVOSB proposals, VOSB proposals, and small businesses to be evaluated in descending order).

For those of you not familiar with tiered evaluation, this is a measure used by the VA in order to comply with its *Kingdomware* mandate to set aside contracts for SDVOSBs, while also providing a "safety net" for itself in the event a procurement does not produce a responsible SDVOSB to which it can make the award at a fair and reasonable price. In that case, it can move on to the VOSB tier, and then the small business tier, without having to conduct a pre-procurement. In February of 2018, the VA published a memorandum outlining its process for conducting tiered evaluations, which remains current.

The VA received proposals from several offerors, but from only one SDVOSB, Brian Hall Properties. The VA also received two VOSB proposals. Bluewater Management Group, LLC, which filed the protest at hand, was a small business but not an SDVOSB or VOSB. It argued that the agency improperly deviated from the solicitation's tiered evaluation criteria, and also that entering into discussions only with Brian Hall amounted to an improper sole source award.

The VA filed a motion to dismiss the protest, which the GAO granted, finding that Bluewater as a non-SDVOSB small business, was not an "interested party" to challenge the VA's conduct with respect to Tier 1 evaluations. It was not in line to

receive the award because there were other intervening tiers that would have had to have been evaluated and found ineligible before the VA would proceed to the third (small business) tier). "Accordingly," the GAO concluded, "the protestor lacks direct economic interest to maintain a protest challenging the agency's actions with regard to the tier 1 offerors."

This case is interesting because it highlights the nuances of the VA's use of tiered evaluations. If you are an SDVOSB, or a VOSB, it may be worth it to become familiar with the VA's tiered evaluation procedures in order to ensure these are being properly followed with respect to VA procurements. (Remember that tiered evaluation was implemented as a means to enforcing *Kingdomware* while also providing the VA some flexibility in doing so).

Also, this case included FAR 512.212-1, where the VA had reserved the right to conduct discussions with offerors. Here, part of the protestor's argument was that the VA had impermissibly allowed the awardee to revise and resubmit its proposal. In the event an SDVOSB finds itself alone in its tier and award could be made at a fair and reasonable price if it had the chance to revise its proposal—and the solicitation contains FAR 512.212-1, a viable argument could be made that the VA *must* do so. FAR 512.212-1 holds that discussions are permissible, and if the VA is bound under *Kingdomware* to award to veterans when possible, the VA should do what it could toward that 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 Jensen with your comments at: scott.jensen@nvsbc.org.



SAVE THE DATE!



**The DoubleTree by Hilton Hotel Orlando at SeaWorld
Orlando, Florida
November 2-4, 2021**

