
Recent Developments May Impact Service-Disabled Veteran-Owned Small Business Verification Processes And Contracting

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Over the past few weeks there have been two significant developments that may impact both the U.S. Department of Defense's (DoD) and the U.S. Department of Veterans Affairs' (the "VA") Service-Disabled Veteran-Owned Small Business (SDVOSB) verification process and procedures. Together, these developments may significantly impact SDVOSB verification processes and contract procedures.

First, on February 29, 2012, the DoD Office of Inspector General issued a report regarding DoD's use of the SDVOSB set-aside program, finding that the DoD had awarded over \$340 million in funds set aside for the SDVOSB program to potentially ineligible contractors.¹ In the report, the Inspector General recommends that the DoD rectify its failure to confirm the accuracy of contractors' SDVOSB status representations by establishing policies and procedures to actively verify contractor status. Second, on March 6, 2012, the U.S. District Court for the District of Columbia issued a decision in what appears to be the first court challenge of a VA SDVOSB VetBiz verification denial.² VetBiz is the VA's online veterans business registry, which provides information on the application process for VA's SDVOSB and Veteran-Owned Small Businesses (VOSBs) verification program and includes a list of VA-verified SDVOSBs and VOSBs. In order to receive contracts with the VA as an SDVOSB or VOSB, the contractor must be VA-verified. In the decision, the court remanded the denial of the plaintiff's request for reconsideration regarding its VA VetBiz verification, holding that the VA failed to provide a satisfactory explanation for the denial.

Background – SDVOSB Programs and Verification

The Veterans Entrepreneurship and Small Business Development Act of 1999, Public Law 106-50, established an annual government-wide goal of not less than 3 percent of the total value of all federal



¹ Department of Defense, Inspector General Report No. DODIG-2012-059, *Inadequate Controls Over the DoD Service-Disabled Veteran-Owned Small Business Set-Aside Program Allow Ineligible Contractors to Receive Contracts*, Feb. 29, 2012.

² *CS-360 LLC v. U.S. Department of Veterans Affairs*, No. 11-00078 (D. D.C. Mar. 6, 2012).

government prime contracts and subcontract awards to be awarded to SDVOSBs. And, in 2003, the Veterans Benefits Act, Public Law 108-183, established a procurement program for SBVOSB concerns. The procurement program enabled contracting officers to restrict competition to SDVOSBCs and award sole source or set-aside contracts to SDVOSBs where certain criteria are met.

I. The Small Business Administration Program and SDVOSB Certification Requirements

The Small Business Administration (SBA) established the SDVOSB Concern Program in 2004. The program sets forth the criteria to be used in federal contracting to determine service-disabled veteran status; business ownership and control requirements for SDVOSBs; guidelines for contracting officers regarding the establishment of sole source and set-aside procurement opportunities; and protest and appeal procedures for SDVOSB procurements.³ SBA's regulations state that in addition to being small under the applicable NAICS code, a SDVOSB concern must be at least 51 percent unconditionally and directly owned by one or more service-disabled veterans and the management and daily business operations of the concern must be controlled by one or more service-disabled veterans. Under SBA's program, a concern's SDVOSB status is not verified by SBA. To submit an offer for SDVOSB set-asides and sole source awards, SDVOSBs must simply represent SDVOSB status in the Central Contractor Registration at the time of its initial offer a representation. The DoD currently relies upon SDVOSBs' self-representation for all DoD awards.

II. The VA's SDVOSB Program and Verification Requirement

The Veterans Benefits, Health Care, and Information Technology Act of 2006, Public Law 109-461, created the VA's acquisition program for SDVOSBs and VOSBs. The purpose of the VA's program is to provide contracting assistance to SDVOSB and VOSB concerns. In October of 2010, President Obama signed the Veterans Benefits Act of 2010, Public Law 111-275, which required the VA to establish a verification program for SDVOSBs and VOSBs wishing to participate in the VA program and serve as either a prime contractor or subcontractor on a VA contract.

To participate in the VA's SDVOSB or VOSB program the concern must be listed as a verified SDVOSB or VOSB in the VetBiz Vendor Information Pages (VIP) verification database. To be eligible for verification, the concern must meet the ownership and control requirements set forth at 38 C.F.R. § 74. Specifically, the concern must be small under the applicable NAICS code, be at least 51 percent unconditionally and directly owned by one or more veterans or service-disabled veterans, and a veteran or service-disabled veteran must control the long-term decision making and day-to-day management of the concern.

Businesses wishing to become verified must complete the application on the Center for Veterans Enterprise (the "CVE") website and submit the required documentation to the CVE. If the CVE denies an application, the applicant may file a request for reconsideration challenging the denial. If the applicant's request for reconsideration is denied, the applicant must wait six months before submitting a new application to the CVE.

DoD's Report on SDVOSB Program Mismanagement

DoD's Inspector General found that the controls over DoD's VA SDVOSB set-aside program were not adequate to ensure that only eligible SDVOSBs obtained VA SDVOSB set-asides and sole source contracts. Specifically, DoD determined that six contracts, valued at approximately \$1.9 million, were awarded to ineligible contractors and 27 contracts, valued at approximately \$340.3 million were awarded to con-

³ 13 C.F.R. § 125.

tractors that potentially misstated their SDVOSB status. The contracts that were awarded to contractors that had potentially misstated their SDVOSB status include several high-dollar contracts, including a \$200 million contract for work at the Naval Facilities Engineering Command, a \$80 million contract for work for the U.S. Army Corps of Engineers, and a \$20 million contract for the U.S. Army Corps' Mobile District.

Of the six contracts awarded to ineligible concerns, the DoD determined that with regard to five of the contracts, the concern did not represent SDVOSB status in the CCR. And, with regard to the sixth contract, the SBA issued a size determination finding the contractor to be other than small, thus, automatically preventing the contractor from qualifying as an eligible SDVOSB.

Although SDVOSBs seeking DoD contracts do not have to be VA-verified, the Inspector General relied upon the VetBiz verification status of DoD contractors in determining if DoD had awarded contracts to ineligible concerns. Indeed, the Inspector General based its determination that the DoD had awarded 27 contracts to concerns that potentially misstated their status on the fact none of the concerns were verified by the VA's CVE. Further, according to the report, six of the concerns, holding 12 of the 27 contracts, were denied SDVOSB status by the CVE because they did not meet VA's ownership and control requirements.

The Inspector General determined that the existing process of relying upon a concern's self-representation compromises the integrity and intention of DoD's SDVOSB program. To ensure that only eligible SDVOSBs receive set-asides and sole source awards in the future, the Inspector General recommended that the DoD establish procedures to evaluate SDVOSB status prior to contract award. Specifically, the report suggests that DoD require contractors to submit documentation of their SDVOSB status, including information demonstrating that a service-disabled veteran is at least a 51 percent owner, holds the highest officer position, and controls the long-term decisionmaking and manages the day-to-day operations of the business.

The Effect of an Additional Certification Process on SDVOSBs

If DoD establishes a SDVOSB verification process, then SDVOSB concerns will be subject to three separate federal certification processes: SBA's self-certification, which would apply to civilian agencies with the exception of the VA, VA's VetBiz verification, and DoD's program. Numerous certification processes could lead to contractor confusion and may significantly impact a contractor's decisions regarding which acquisitions to pursue.

First Court Decision Remanding SDVOSB Verification Denial To The VA

On March 6, 2012, the U.S. District Court for the District of Columbia issued a decision in the first known court challenge of a VA SDVOSB verification denial. The plaintiff, CS-360, LLC (CS-360), appealed the VA's denial of its request for reconsideration for VA verification to the District Court arguing that (1) the VA's denial was arbitrary and capricious, (2) the VA violated the Due Process Clause by failing to permit the applicant to appeal the decision by the VA CVE to an independent decisionmaker, and (3) the VA is without statutory authority to issue the regulations requiring verification by the VA. The court summarily dismissed counts two and three of CS-360's complaint but remanded CS-360's denial of its request for reconsideration to the VA on the basis that the VA had failed to provide a satisfactory contemporaneous explanation for its decision to deny CS-360's application for inclusion in the VetBiz database. According to the decision, the VA denied CS-360's application for verification on the basis that CS-360 was not controlled by one or more SDVOSBs and, thus, did not qualify for inclusion in the database. In its 42-page decision, the court determined that the defects in the VA's written denials were so extensive that it pre-

cluded the court from effectively exercising review. In reaching its decision, the court reasoned that the VA's denial was so disjointed that the court was unable to identify "a rational connection between the facts found and the choice made" by the VA in denying CS-360's application.

The Effect of the Decision on SDVOSBs

Contractors that have been denied verification by the VA may now challenge the VA's denial in district court. Additionally, the VA may have to reevaluate its process for issuing denials in order to ensure that such denials are coherent and based upon a reasonable assessment of the facts. Changes to the VA's procedures requiring the VA to invest additional time in its assessment and decision notifications may increase the backlog of verification applications. Contractors who wish to seek VA verification should take the time to review the VA's VetBiz website and verification requirements focusing on the ownership and control requirements prior to submitting their applications.

Pillsbury has counseled SDVOSBs on SBA and VA's requirements and has represented contractors before the VA on verification matters. We will continue to monitor and report on developments in the SDVOSB realm.

If you have questions, please contact the Pillsbury attorney with whom you regularly work or the authors:

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