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VIA FEDERAL ERULEMAKING PORTAL

Tom Leney
Executive Director
Office of Small and Disadvantaged Business Utilization
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

Re: RIN: 2900–AO63, Comments on U.S. Department of Veteran Affairs ("VA") Proposed Rule – VA Veteran-Owned Small Business ("VOSB") Verification Guidelines

Dear Mr. Leney:

We are writing to submit comments on the above-referenced Proposed Rule, issued November 6, 2015, 80 Fed. Reg. 68,795, to amend the VA's VOSB Verification Program. In our practice, we represent many veteran-owned firms that apply to and participate in the VA Program. We also work with firms that participate in the various procurement programs for small businesses administered by the U.S. Small Business Administration ("SBA"). We appreciate the opportunity to comment on the Proposed Rule, as it will change the ability of VOSBs to obtain verified eligibility status through the Center for Verification and Evaluation ("CVE"). We believe that most of the proposed changes are beneficial, and will help clarify the eligibility requirements for new applicants and current participants in the program. We have grouped our comments below according to the revised regulatory sections.

- **Section 74.1, Definitions**

We believe that the proposal to eliminate the terms "day-to-day management" and "day-to-day operations" and replace them with "daily business operations" provides needed clarity regarding the veteran's control over the concern. The veteran must be in control of "daily business operations," which will be defined as marketing, production, sales, administrative, plus supervising executive team, implementing sound policies, and setting strategic direction of the company.

We suggest the VA revise the proposed definition for "principal place of business" to account for the location where the veteran spends the majority of his or her time. This would

address the possibility that location where the veteran manages the operations of the firm differs from a separate location where the firm conducts most of its other operations or marketing.

However, we believe that the revised definition for "permanent caregiver" will be more problematic in its implementation. The Proposed Rule will require the applicant to "demonstrate that but for the permanent and severe disability the veteran would meet the requirements of this part." In order to satisfy such criteria, the applicant will need to provide "an explanatory statement which states the nexus between the veteran's disability and the need for the permanent caregiver to manage the concern." It is unclear from the Proposed Rule how the applicant is expected to satisfy this requirement. For example, will it be necessary for the veteran to have prior experience in the applicant's industry? We believe that such information is extraneous and not necessary for the VA's review of the applicant, since the applicant is already otherwise required to provide an explanation regarding the rationale for the primary caregiver's appointment, how the appointment contributes to the veteran's well-being, why the primary giver is needed to manage the applicant, and the veteran's consent to appointment.

- **Section 74.2, Eligibility Requirements for VetBiz Vendor Information Pages ("VIP") Verification Program**

The Proposed Rule contemplates immediate removal from the VetBiz VIP database for any firm found otherwise ineligible for a particular procurement due to a SBA protest decision "or other negative finding." Until CVE receives official notification that the firm has successfully rectified the grounds for the SBA's negative decision, such as prevailing on appeal to the SBA's Office of Hearings and Appeals ("OHA"), the firm will remain ineligible to participate in the program. A similar penalty is contemplated if a firm has temporarily loses any necessary permits, licenses, and charters required to perform contracts.

While we understand the VA's intention to keep the VetBiz VIP database accessible only to eligible concerns, we believe that the Proposed Rule provides for unduly harsh penalties in these instances. Rather than providing for immediate removal following a negative SBA decision, we recommend that the VA not implement this portion of the Proposed Rule, as there are simply too many nuances within SBA rulings that may potentially cause problems if the VA tries to implement a uniform, automatic removal based on SBA decisions. The VA should treat such matters on a case-by-case basis.

As a threshold consideration, it is unclear if the SBA's negative findings as described in the Proposed Rule would be in connection with a SBA size protest or protest of the concern's SDVOSB status within the SBA's program. These are two separate considerations. As you are aware, the SBA's SDVOSB program utilizes separate and distinct eligibility criteria from those of CVE. Therefore, if a firm has received a negative determination regarding its SDVOSB status from the SBA, this may not be connected to or have bearing on its CVE eligibility. Moreover,

the SBA's determination of a firm's size is always issued expressly in connection with one particular size standard. Requiring a firm to be removed from the VetBiz VIP database after a single negative size determination is therefore unduly punitive, as a firm may be found to be large under one size standard but is still small under other, larger size standards. In addition, SBA size determinations are often "contract specific," in that the firm will only be found large in connection with one particular procurement. Negative findings under such size determinations will not impact size eligibility under any NAICS code beyond that contract.

The Proposed Rule also goes beyond the penalties required by the SBA if a concern is found to be ineligible for a small business set-aside of SBA SDVOSB set-aside procurement. For example, under SBA's regulations if a firm is found to be other than small or not an SDVOSB as a result of a size or status determination and the firm timely submits an appeal to the SBA's OHA, the procuring agency is not required to terminate contract award. See 13 C.F.R. § 121.1009(g)(2); 125.27(g)(2). Indeed, even if the SBA's OHA ultimately affirms the negative determination, the firm may still continue performance through the contract's base term. 13 C.F.R. § 121.1009(g)(2)(iii); 125.27(g)(2)(iii). If the Proposed Rule is implemented, it will require the firm to be removed from the VetBiz VIP database immediately upon receipt of the negative determination, even though under the SBA's regulations the firm would otherwise be able to proceed with contract performance.

With regard to a firm's loss of necessary permits, licenses, and state charters, we believe that the Proposed Rule would also impose unduly harsh consequences. For example, in some instances the loss of a permit or license may be remedied very quickly, such as paying the licensing fee or providing updated information. Automatic removal from the VetBiz VIP database due to the loss of such permits and licenses does not align with the firm's ability to, in many instances, quickly remedy the problem. If the VA's intent is to ensure that participants maintain current permits, licenses, and state charters, it may address such a concern by allowing firms a reasonable cure period. Immediate removal from the database does not comport with the severity of the offense.

- **Section 74.3, Unconditional Ownership**

Generally, we welcome the VA's proposed changes pertaining to unconditional ownership. We believe that it benefits program participants to allow for greater rights for minority owners, such as the commercially reasonable business practices. We believe that it is helpful for the VA to consider a firm's ownership "on a case-by-case basis," and to be guided by the "general use of similar conditions by concerns within the same or similar line of business and uniform applicability of the condition(s)." However, applicants would be aided if the VA provided specific examples regarding what type of ownership terms and conditions that it would consider restrictive or unacceptable. We suggest mentioning a few specific examples in the rules of the types of provisions or issues the VA would not find acceptable.

Conversely, we think the rules should also contain specific examples of the types of provisions and actions the VA would find acceptable for a minority owner to vote on. We understand the rules cannot provide for every eventuality, and we think the general language proposed is helpful because it provides flexibility for commercial reasonableness and case-by-case determinations. But, at the same time, it would be beneficial to retain the existing language that specifically approves of stock pledges, including seller financed transactions, as long as they follow normal commercial practices and do not impede veteran's control absent violation of the terms. Removing this specific language may leave the impression that such actions are no longer viewed as favorably as they were under the existing rules.

We also believe that the VA should consider removing its proposal to require the submission of a contract novation agreement in accordance with FAR Subpart 42.12 if the participant substitutes one veteran owner for another during contract performance. Under FAR Subpart 42.12, a simple change of ownership does not trigger novation proceedings in all cases. Indeed, the FAR contemplates novation proceedings to be necessary only when a third party's interest in the contract arises out of the transfer of: (1) all the contractor's assets; or (2) the entire portion of the assets involved in performing the contract. See FAR 42.1204(a). The FAR specifically states that a novation agreement is unnecessary "when there is a change in the ownership of a contractor as a result of a stock purchase, with no legal change in the contracting party, and when that contracting party remains in control of the assets and is the party performing the contract." FAR 42.1204(b). In many cases, a participant's substitution of one veteran owner for another would be the result of a stock purchase, and would not require the submission of a novation agreement since the stock purchase would not alter the identity of contractor, or result in a transfer of the contract to a third party. Requiring VOSBs to submit a novation agreement when one veteran is substituted for another would result in the imposition of unnecessary administrative burdens on program participants.

- **Section 74.4, Control**

Under the Proposed Rule, CVE will be allowed to consider "the control potential of . . . key employees on a case-by-case basis." Key employees are those "who possess expertise or responsibilities related to the concern's primary economic activity." We believe that the provided definition of "key employee," in conjunction with the vague guidance regarding CVE's ability to consider "the control potential" of such individuals, will not provide participant firms sufficient clarity regarding who will be considered a key employee, and how the CVE will determine whether they may potentially exercise undue control over the concern. For example, under the Proposed Rule, CVE could potentially find a firm's experienced program manager to unduly control the concern, since the program manager will presumably "possess expertise or responsibilities related to the concern's primary economic activity." If the program manager's experience is ultimately instrumental in the firm's securement of multiple contract awards, will

that individual be found to exercise an undue amount of control? It may be beneficial for the VA to include a definition of what constitutes "control" in Section 74.1, Definitions, so firms are able to better monitor the duties and responsibilities of their key employees.

The Proposed Rule also allows the veteran owner to give up control over extraordinary decisions, which include but are not limited to acceptance of new capital contributions, additional members, amending the agreement in a manner that materially alters the rights of all members, issuance of new shares, and sale or lease of all or substantially all assets. We welcome these changes, as they conform to general commercially accepted practices. These changes will make it easier for veterans to bring on minority owners and grow their companies, which is advantageous for the veterans and the program.

In addition to the examples of extraordinary business decisions listed in the Proposed Rule, we suggest that the VA also include the following three examples: the filing or consenting to filing of a petition for or against the firm under any federal or state bankruptcy, insolvency, or reorganization act; authorizing the dissolution of the firm; and authorizing the merger or consolidation of the firm with any other entity. The SBA's OHA has previously held that these three actions are extraordinary and do not constitute the exercise of negative control. See Size Appeal of DooleyMack Government Contracting, LLC, SBA No. SIZ-5086 (2009) (finding filing for bankruptcy, receivership, or admitting the firm is insolvent are extraordinary actions); Size Appeal of Carntribe-Clement 8AJV #1, LLC, SBA No. SIZ-5357 (2012) (holding minority venturer did not negatively control 8(a) joint venture where he had veto power over dissolving the joint venture); Size Appeal of Cypress Pharmaceutical, Inc., SBA No. SIZ-5065 (2009) (noting "extraordinary actions" include merger).

We do not believe that proposed requirement mandating the veteran owner to maintain unilateral ability to amend the firm's governing documents without requiring the consent of the non-veteran owners is either advisable or practical. Even though the Proposed Rule would provide a carve-out for extraordinary business decisions, such a requirement will necessarily, and quite rightly, pose a major stumbling block for a firm's non-veteran owners to agree to pursue program participation.

A non-veteran or entity may be found to control a firm when the non-veteran or entity maintains an equity interest in the firm and provides "critical financial or bonding support or a critical license to the applicant or participant." Critical financing is where the withholding or withdrawal of the financial support may cause the business to fail to meet its financial obligations, may allow a non-veteran or entity to significantly influence business decisions, or may result in a dependent relationship. Here, the VA has removed language previously found in the regulations which allows for an exception from a determination of control based on critical financial support if such an exception is provided for by the Office of Small and Disadvantaged Business Utilization ("OSDBU"). We are wondering why the VA has removed the ability for

the OSDBU to provide for such an exception. We believe that allowing the OSDBU to make such a determination makes sense, as a firm may rely on critical financing when it has been initially capitalized, for example.

- **Section 74.5, Affiliation**

We agree with the VA's clarification that it is the SBA, and not CVE, that decides whether affiliation exists.

We believe that the VA should allow CVE-approved VOSBs to joint venture without seeking a separate approval from CVE for the joint venture itself. In our practice, joint ventures are a common and useful tool for small businesses hoping to perform larger projects that they would not be able to perform on their own. The SBA's rules permit a joint venture to be considered an SDVOSB for a procurement so long as one of the joint venture partners is an SDVOSB. There is no requirement for the SBA to separately approve an SDVOSB joint venture. However, the Proposed Rule implements the VA's practice of only permitting a joint venture to be considered an SDVOSB for a procurement if the joint venture itself goes through the CVE verification process.

Eligibility of SDVOSB joint ventures for VA procurements is governed by VA Acquisition Regulation ("VAAR") § 819.7003(c). This regulation states, in relevant part, that "[a] joint venture may be considered an SDVOSB or VOSB concern if . . . [a]t least one member of the joint venture is an SDVOSB or VOSB concern, and makes the representations in [VAAR § 819.7003(b)]." VAAR § 819.7003(c)(1) (emphasis added). We interpret this to mean that the SDVOSB partner to the joint venture, not the joint venture itself, is required to make the representations in VAAR § 819.7003(b), which include, among other representations, a representation as to being "[v]erified for eligibility in the VIP database." VAAR § 819.7003(b)(3). Interpreted this way, VAAR § 819.7003(c) does not require an SDVOSB joint venture to be separately verified by CVE. Rather, the regulation only requires that the SDVOSB partner to the joint venture go through the CVE verification process for the joint venture to be considered an SDVOSB.

Requiring veterans to undergo a second verification process for their joint venture creates inefficiencies and limits the use of joint ventures. If one of the joint venture partners has already been verified by CVE, the verification should be applied to the joint venture. Such an approach would be consistent with how the SBA deals with SDVOSB joint ventures and would make it easier for SDVOSBs to take advantage of joint ventures for VA procurements.

Approaching joint ventures as we are suggesting would also be consistent with the definition of a joint venture as proposed in Section 74.1. Joint ventures are not supposed to be ongoing entities; they are supposed to be limited ventures formed for a particular contract, or a

few contracts. However, because the Proposed Rule will require the joint venture to be separately verified, it is very difficult for veterans to form a joint venture for a specific contract. Often times, the window to bid a contract comes and goes before the veteran could realistically hope to get the joint venture through the CVE verification process. We believe this is why we have done a number of joint ventures for our veteran clients on non-VA projects, but very few through the VA Program. Joint ventures are useful tools for veterans and should be more readily accessible for participants in the VA Program.

- **Section 74.14, Reapplication for Program Admission**

We believe that the Proposed Rule's implementation of a 12 month waiting period before reapplication after the denial of a firm's application, request for reconsideration, or appeal of verified status is unnecessarily long and unduly burdensome to the small business community the VOSB program is meant to serve. An application may be denied for minor technicalities, which may have slipped past the VA's pre-determination and could be addressed and remedied very quickly by the applicant once the problem is identified. A 90 day waiting period would be fairer, as it would allow the applicant a chance to fix any problems and reapply in a timely fashion.

Please do not hesitate to contact Pam Mazza, Jon Williams, Katie Flood, or Peter Ford at (202) 857-1000 if you have any questions about these comments.

Sincerely,

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