

Navigating the SBA's & VA's Veteran-Owned Company Programs



A PilieroMazza Webinar
December 10, 2013



PRESENTED BY

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SDVOSB PROGRAMS

- ❖ There are two programs for SDVOSBs, one through the SBA and the other through the VA, in addition the VA has a VOSB program (the only of its kind).
- ❖ Goals are to increase the Federal Government's contracting with military veterans and to assist veterans in the transition from active duty to civilian life, this includes a proposed increase for DOD spending.
- ❖ Competitive and sole source set-aside opportunities.
- ❖ The VA has a Mentor-Protégé Program (unapproved); the SBA Mentor-Protégé Program coming soon.
- ❖ Joint ventures with other small businesses.



ELIGIBILITY REQUIREMENTS FOR THE SBA'S SDVOSB PROGRAM

- ❖ Must be a small business.
- ❖ Veteran owner must have a service-connected disability as determined by the VA or DoD.
- ❖ Must meet eligibility requirements only on day of proposal submission.
- ❖ Must be unconditionally and directly owned by a Service-Disabled Veteran (SDV).



UNCONDITIONALLY AND DIRECTLY OWNED BY A SERVICE-DISABLED VETERAN

- ❖ Service-disabled veteran(s) must own at least 51% of the concern:
 - Ownership must be direct
 1. For example, a concern that is owned principally by another concern that is in turn owned and controlled by SDVs does not meet the requirements.
 2. Ownership may be held by a trust if it is revocable, and SDVs are the grantors, trustees, and the current beneficiaries of the trust.
 - Service Disabled Veteran must have unconditional ownership
 1. Partnerships meet the requirements when at least 51% of every class of the partnership interest is unconditionally owned by one or more SDV. Ownership must be reflected in the partnership agreement.
 2. An LLC meets the requirements when at least 51% of each class of member interest must be unconditionally owned by one or more SDV.
 3. A corporation meets the requirements when at least 51% of the aggregate of all stock outstanding and at least 51% of each class of voting stock outstanding are unconditionally owned by SDVs.



WHO CONTROLS AN SDVO SBC?

- ❖ An eligible SDVO SBC must have management and the day-to-day business operations controlled by one or more service-disabled veteran.
 - A service-disabled veteran must hold the highest officer position and must have managerial experience.
 - The service-disabled veteran need not have the technical expertise or possess the required license as long as the service-disabled veteran can demonstrate he/she has ultimate managerial and supervisory control.
- ❖ In the case of a partnership the one or more service-disabled veteran(s) must serve as general partner(s) with control over all partnership decision.
- ❖ In the case of a LLC one or more service-disabled veteran(s) must serve as managing member(s) with control over all decisions.



WHO CONTROLS AN SDVO SBC?

- ❖ In the case of a corporation, one or more service-disabled veteran(s) must control the Board of Directors. Service-disabled veterans are considered to control the Board of Directors when:
 - One or more service-disabled veteran(s) own at least 51% of all voting stock, are on the Board of Directors, and have the percentage of voting stock necessary to overcome any super majority voting requirements; or
 - Service-disabled veterans comprise the majority of voting directors through actual numbers or where permitted by state law, through weighted voting.
- ❖ The service disabled-veteran does not need to have direct control over all actions of the board of directors as long as the service disabled veteran has the independent ability to remove directors and appoint new directors via simple majority. See Alpha Terra Engineering, Inc., SBA No. VET-238 (Sept. 12, 2013).



REQUIREMENTS FOR A JOINT VENTURE

- ❖ An SDVO SBC may enter into a joint venture agreement with one or more other SBCs for the purpose of performing an SDVO contract.
- ❖ Joint venture partners are not limited to only SDVOSBs. Other small businesses or mentors can be members to a SDVOSB joint venture (unlike HUBZones).
- ❖ A joint venture of at least one SDVO SBC and one or more other business concerns may submit an offer as a small business for a competitive SDVO SBC procurement so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, provided.
 - For a procurement having a revenue-based size standard, the procurement exceeds half the size standard corresponding to the NAICS code assigned to the contract; or
 - For a procurement having an employee-based size standard, the procurement exceeds \$10 million.
- ❖ Performance of work. For any SDVO contract, the joint venture must perform the applicable percentage of work required by §124.510 (no internal performance of work requirements).



CONTRACT REQUIREMENTS FOR A JOINT VENTURE

- ❖ Contents of JV agreement. Every JV agreement to perform an SDVO contract must contain a provision:
 - Setting forth the purpose of the joint venture;
 - Designating an SDVO SBC as the managing venturer, and an employee of the managing venturer as the PM;
 - Stating that not less than 51% of the net profits earned by the joint venture will be distributed to the SDVO SBC(s);
 - Specifying the responsibilities of the parties with regard to contract performance, source of labor and negotiation of the SDVO contract;
 - Obligating all JV parties to ensure performance of the contract and to complete performance despite any member's withdrawal;
 - Requiring the retention of final original records by the managing venturer upon completion (keep on-site at SDVOSB or exclusively within SDVOSB's possession).
- ❖ Templates or any other available form documents available through the SBA website cannot be relied upon. You must understand the regulations behind every form/template/contract. See KRR Partners Joint Venture, SBA No. VET-239 (Sept. 16, 2013).



FILING STATUS PROTESTS AT SBA

- ❖ Must be submitted to the contracting officer by the COB on the 5th business day following bid opening or the receipt of a notice of award (contracting officer must forward protest to SBA).
- ❖ Any protest submitted after the COB on the 5th business is untimely, but a protest submitted before bid opening/an award decision is premature.
- ❖ Must be in writing, and must specify all the grounds upon which the protest is based (just saying “Company X is not owned by a service-disabled veteran” is not sufficient).



HOW THE SBA PROCESSES AN SDVO PROTEST

- ❖ Notice to protested concern. If SBA determines that the protest is timely, sufficiently specific and is based upon protestable allegations, SBA will:
 - Notify the protested concern of the protest and of its right to submit information responding to the protest within ten business days from the date of the notice; and
 - Forward a copy of the protest to the protested concern, with a copy to the contracting officer if one has not already been made available.
- ❖ SBA will notify the CO, the protester, and the protested concern in writing of its determination.
- ❖ If SBA does not issue its determination within 15 business days (or request an extension that is granted), the CO may award the contract if she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government.



APPEAL OF SDVO STATUS PROTEST

- ❖ The protested concern, the protester, or the contracting officer may file an appeal of an SDVO status protest determination with OHA in accordance with 13 C.F.R. § 134 which states:
- ❖ Appeals from an SDVO SBC protest determination must be commenced by filing and serving an appeal petition within 10 business days after the appellant receives the SDVO SBC protest determination. An untimely appeal will be dismissed.
- ❖ The standard of review for an appeal of a SDVO SBC protest determination is whether the D/GC's determination was based on clear error of fact or law.
- ❖ With respect to status determinations on whether the owner is a veteran, service-disabled veteran, or veteran with a permanent and severe disability, the Judge will not review the determinations made by the U.S. Department of Veteran's Affairs, U.S. Department of Defense, or such determinations identified by documents provided by the U.S. National Archives and Records Administration.



THE VA'S SDVOSB PROGRAM

- ❖ The VA's SDVOSB Program with the newly titled Center for Verification and Evaluation only applies to VA (& FAA?) Procurements.
- ❖ The VA's Program is substantially similar to the SBA, with certain key difference we discuss below.
- ❖ The VA's Program applies to Both SDVOSBs And VOSBs with the main difference, the fact that no service disability is needed to be a VOSB.
- ❖ The VA application process takes approximately 3 months.
 - The VA processes both VOSB and SDVOSB applications but SDVOSB get priority in processing.
 - Verified in www.VetBiz.gov by the VA's CVE.
 - Must be eligible at time of proposal and time of award.
 - Re-verification every two years.

BOARD OF DIRECTORS AND QUORUM PROVISIONS

- ❖ Unlike the SBA requirements, VA policy dictates that the veteran must directly control the board of directors.
- ❖ VA policy prohibits 1) non-veteran/non-service-disabled veteran directors to be necessary to satisfy quorum requirements or 2) non-veteran/ non-service-disabled veteran directors to alone satisfy quorum requirements or allow the board to vote without the veteran director(s).
- ❖ **Tips:** If possible, establish a board of directors with only one director (the veteran); provide the veteran director with supermajority voting rights; specify that the veteran director's presence alone is sufficient to satisfy the quorum requirement; kick issues to the shareholders in the event of deadlock by the board.

TRANSFER RESTRICTIONS

❖ VA Requirement

- Ability of service-disabled veteran to transfer his ownership stake “to whomever he wants, whenever he wants” no longer the standard.
- Transfer restrictions used in normal commercial dealings that do not burden the service-disabled veteran’s ownership interest unless he chooses to sell some of his stake now permitted.
- Right-of-first-refusal, tag-along rights, and provision requiring prior approval of other owners viewed as acceptable.

❖ Tips - Despite the VA’s new position, we recommend eliminating most transfer restrictions or carving the veteran out of the transfer restriction, unless it is narrowly crafted.

VETERAN INVOLVEMENT IN DAY-TO-DAY BUSINESS ACTIVITY

- ❖ VA Requirements are similar to the SBA, but somewhat more strict.
 - A veteran owner must show “sustained and significant time” invested in the applicant firm, but does not need to work full-time for the applicant firm.
 - However, a veteran manager must devote full-time to the applicant firm during normal business hours.
 - Work in a wholly-owned subsidiary may count (SDVOSB eligible company cannot be a subsidiary).
- ❖ In contrast, OHA has held that under SBA rules a veteran controlled the day-to-day management of a company, even where he worked full-time at another company, an 8(a) concern. Med Trends, Inc., SBA No. VET-198 (2010).

VETERAN QUALIFICATIONS & COMPENSATION

- ❖ **VA Requirements are similar to the SBA in that the veteran must have managerial experience of the extent and complexity needed to run the applicant, need not have technical expertise or required licenses, but must have managerial and supervisory control over those who do, and must hold the highest officer position.**
- ❖ **Unlike the SBA, VA regulations specifically require the veteran to be the highest compensated unless there is a business reason to pay someone else more.**

SIGNIFICANT BUSINESS RELATIONSHIPS WITH OTHER FIRMS

- ❖ Similar to the SBA case law, for the VA requirement non-veterans or entities may be found to control the applicant firm when the applicant is so dependent on business relationships with non-veterans or entities that the applicant is unable to exercise independent business judgment without great economic risk.
- ❖ Tips: To assist in avoiding economic dependence are to have the veteran firm should do as many of the back office functions as possible, separate other companies with existing relationships as much as possible, avoid always teaming with the same company, avoid (or greatly reduce) common ownership, management, employees, and facilities with another firm.

COMMUNITY PROPERTY

- ❖ Unlike SBA, the VA regulations contain a specific requirement that if the veteran resides in a community property state, VA will consider the applicable state community property laws in determining whether the veteran unconditionally owns the applicant firm.
- ❖ Commonly, veteran owners residing in community property states are not aware of how the VA interprets community property so they have not taken the necessary steps to protect themselves.
- ❖ We recommend prepare a “Transmutation Agreement” stating that the veteran’s ownership of the applicant firm is not community property and include the agreement with your application to VA.

TRUSTS

- ❖ The VA, similar to the SBA, states that the veteran's ownership must be direct, but that ownership may be held in trust if the trust is revocable, and if the veteran is the grantor, a trustee, and the sole current beneficiary of the trust.
- ❖ We recommend carefully review the terms and conditions of the trust prior to submission and amend the trust if necessary to make sure it meets these requirements.
- ❖ When submitting the trust agreement to the VA, we recommend also explaining how the trust satisfies the VA's requirements.

JOINT VENTURES

- ❖ Under the VA's requirements, a joint venture must be a separate legal entity, that is majority owned and controlled by a verified SDVOSB or VOSB, and must be separately verified and listed in VetBiz.gov.
- ❖ Accordingly, do not file simultaneous verification applications for the veteran-owned firm and the joint venture – the veteran-owned firm must be approved first. And then the joint venture must be verified prior to submitting a proposal.
- ❖ The joint venture must comply with SBA's joint venture requirements found at 13 C.F.R. § 125.15(b)(2), must meet the applicable prime contractor performance of work requirements (13 C.F.R. § 125.15(b)(3)), and generally control and ownership requirements still apply.

ENFORCEMENT OF VA REQUIREMENTS

- ❖ **On-Site examinations-** VA may conduct a verification examination on a random (unannounced) basis, or if VA receives credible information indicating that a firm no longer meets the eligibility requirements.
- ❖ **Status Protests-** Largely mirror SBA procedures (i.e., must be specific, submitted to the contracting officer by COB on the 5th business day following bid opening/award notification, etc.) The CO will forward the status protest to CVE, unless clearly premature.
- ❖ **Protest decisions** are due within 21 days, and, absent an extension, the contracting officer may award a contract to an apparently successful offeror if no decision is issued within that time.



VA PROTESTS UNDER THE NEW RULE

- ❖ Denial decisions on the basis of failure to meet service-disabled/veteran criteria are not appealable.
- ❖ Protestor or protested firm may file a written appeal of the status protestor with the Executive Director, OSDDBU. Deadline of appeal is 5 business days after date of receipt of status protest determination.
- ❖ Decisions on protest are effective immediately. If a contract has already been awarded, the awarded contract shall be deemed void ab initio. The contract will be rescinded and will be awarded to the next-in-line SDVOSB/VOSB. If the contract has not been awarded, the appeal decision will apply to the pending acquisition. If the decision is received after award, and the protested party loses, the Contracting Officer may terminate the contract or not exercise the next option.
- ❖ Ineligible SDVOSB/VOSB may not submit another officer as a SDVOSB/VOSB VA procurement unless it successfully appeals the determination or it applies for and receives verified SDVOSB/VOSB status.



HIGHLIGHTS OF RECENT SDVOSB REGULATORY CHANGES

- ❖ The VA issued a final rule confirming that firms are required to re-verify SDVOSB/VOSB every 2 years rather than annually. 78 Fed. Reg. 52085 (Aug. 22, 2013).
- ❖ The VA will not enter into an interagency agreement with the SBA for adjudication of VA SDVOSB/VOSB status protests by SBA. The VA will continue to handle VA SDVOSB/VOSB status protests.
- ❖ Recently, the VA has stated that it is considering a rule change that would permit transfer restrictions (such as a right of first refusal) on a veteran's ownership. The VA is considering other rule changes in addition to relaxing the ban on transfer restrictions and hopes to issue a final rule by mid-2014.
- ❖ CVE is now requiring that SDVOSBs be small under each NAICS code listed in the firm's VetBiz profile. In an August email, CVE stated that SDVOSBs must remove any NAICS codes for which they do not qualify as a small business within 30 days.
- ❖ A recent bill in the House of Representatives was introduced which would consolidate the definition of an SDVOSB and would place responsibility for the administration of the SDVOSB program with the SBA. This bill is still in committee.



CONSEQUENCES OF MISREPRESENTING SDVO SBC STATUS

- ❖ **Presumption of Loss Rule**
 - There is a presumption of loss to the United States based on the total amount expended on the contract, subcontract, etc. whenever it is established that a business concern other than a SDVO SBC willfully sought and received the award by misrepresentation.
- ❖ **Limitation of Liability**
 - This rule does not apply in the case of unintentional errors, technical malfunctions, etc. that demonstrate that a misrepresentation was not affirmative, intentional, willful.
 - Similarly, a prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors.
 - Relevant factors to consider in making this determination include the firm's internal management procedures, the clarity or ambiguity of the representation or certification requirement, and efforts made to timely correct an incorrect or invalid representation or certification.



CONSEQUENCES OF MISREPRESENTING SDVO SBC STATUS

- ❖ The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for misrepresenting a firm's status.
- ❖ Persons or concerns are subject to severe civil and criminal penalties under the False Claims Act, 31 U.S.C. 3729-3733, and under the Program Fraud Civil Remedies Act, 331 U.S.C. 3801-3812, and any other applicable civil and criminal laws.



ANY QUESTIONS?

Thank you for joining us today.

If you would like to speak with Cy or Alex about the SDVOSB Programs, please contact them at:

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Today's slides and a link to the recording will be emailed to everyone by Dec. 12th

Join us for our next webinar on January 21, 2014 discussing Small Business Affiliation.

A registration link will be included in the follow up email