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VA looks to SBA for Future Veteran-Owned Small Business Certification

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January 10 & 11, 2018 - The Department of Veterans Affairs (VA) has published two Notices of Proposed Rulemaking which, in effect, (1) would shift the duties of certifying Veteran-Owned Small Businesses (VOSBs) as relates to Ownership and Control (O&C) from the VA to the U.S. Small Business Administration (SBA) (*see, https://www.federalregister.gov/documents/2018/01/10/2017-27715 /va-veteran-owned-small-business-vosb-verification-guidelines*); and (2) revises the regulations dealing with set-asides and sole source awards under the Veterans First Contracting Program (https://www.federalregister.gov/documents/2018/01/11/2018-00169/revise-and-streamline-va-acquisition-regulation-to-adhere-to-federal-acquisition-regulation). While subject to comment periods and final rulemakings, the big picture story line is that this revised regulatory scheme, if passed, will shift much of the oversight on VOSBs from the VA to the SBA.

I. O&C OVERSIGHT TO BE MOVED TO THE SBA?

A. Background:

While the SBA oversees almost all small business concerns related to federal procurements, including the SDVOSB program, the VA has had its own veteran-owned business certification program, called the Vets First Verification Program. Arising out of the Veterans Benefits, Health Care and Information Technology Act of 2006 (PL 109-461), this program granted the VA with unique authorization to certify businesses as VOSBs and SDVOSBs as well as set-aside and issues sole source contracts to these entities for VA-specific procurements. This was a program wholly independent of the SBA's SDVOSB set-aside program, which covers agencies outside the VA for procurements.

Traditionally, in contrast to the organized, detailed certification program that the VA has, in which it affirmatively certifies entities as VOSBs, the SBA's SDVOSB program is a self-certifying program. Businesses would self-certify as being Service Disabled Veteran Owned (and Small) for reasons of pursuing contracts outside the VA. This remains, but now the VA is "transferring" some of its oversight to the SBA.

B. So What Does This Mean?

As a result of the National Defense Authorization Act (PL 114-840) designating the SBA as the Federal Agency responsible for overseeing and regulating issues relating to "ownership and control" (O&C) of small businesses, the VA is proposing to remove all references in its regulations to O&C issues. O&C are some of the key factors that SBA (and currently the VA) use to verify a business is in fact Veteran-owned.

It is not enough that there is mere ownership in the entity by a veteran or service-disabled veteran, but that the service disabled veteran individual(s) own, control and manage on a day-to-day and long term basis the entity.

VA's proposed rulemaking will still keep with the VA the internal certification program and some procedures, but seeks to now utilize SBA to decide O&C-realted issues. Rebranding its internal certification operations, the VA proposes that its Center for Verification and Evaluation (CVE) assist VA Contracting Officers in identifying VOSBs and to communicate with the SBA on small business status of entities.

Allowing Joint Ventures, the proposed regulations require that at least one JV partner be veteran-owned and that the JV *must* be in the form of a separate legal entity. This is similar to the SBA's SDVOSB program, which allows JVs so long as one of the members is an SDVOSB and all members are "small" (the one expectation is the SBA's mentor-protégé program, which allows large businesses to partner with small businesses). The "separate legal entity", is not as clear in definition as one might like. Typically one might expect the JV to be a limited partnership or limited lability company given this language, something we, as legal counsel, generally recommend regardless, but it is open to a general partnership or some other form of limited liability entity. How this language is defined will need to be determined or clarified by the VA in the future. These proposed regulations would also require that any JV Agreement comply with the SBA's regulations at 13 CFR Part 125 and extends those SBA regulations to the VOSBs (not just the SDVOSBCs that SBA oversees).

Looking to the O&C issues, VA's new proposed regulations point to Title 13 of the Code of Federal Regulations, which are the SBA's regulations governing small business programs (*see,* Part 125). While Part 125 is limited to SDVOSBs, these regulations now incorporate the same ownership criteria for VOSBs by reference.

Likewise, the new proposed regulations point to 13 CFR Part 125 for purposes of defining "Control," which also is limited to SDVOSBs under SBA's regulations, but again, the VA regulations state that the same will also apply to VOSBs.

A major issue over the years in our experience relating to small business concerns is the issue of "affiliation". Without getting overly technical, affiliation relates to how potentially related businesses are looked at by the SBA and whether they are in reality related and as a result looked at in combination to determine size status. Affiliation is found to exist between multiple businesses where, for example, there is a relationship, whether though family relations, former employee relationships, over use or reliance on one or more businesses for performing contractors or other bases, such that the other businesses are seen as "affiliates" of the proposed small business. Under this circumstance, where there is a finding of affiliation, the combined revenues (or number of employees) are counted together to determine size status. Often, this results in the business claiming that it is small to be found to be other than small. The VA's proposed rulemaking now points to the SBA's affiliation regulations under 13 CFR Part 121 and states that the SBA, not the VA, will make affiliation determinations.

In effect, the VA has now agreed to subject its procurements and its certified VOSBs to the SBA's jurisdiction and oversight.

II. Kingdomware & Veterans First Remains Relevant:

Recall from our prior posts that the Supreme Court in *Kingdomware* finally settled a long, drawn out "fight" or dispute between the VA and Government Accountability Office (GAO) over whether VA could avoid the requirement to set aside certain contracts for VOSBs. *See,* Posts of September 6, 2017 and June 8, 2017.

Tied to this discussion, is a line of cases dealing with the VA's "decertification" of VOSBs, finding that there inconsistences in VA's application of the regulations that resulted in the VA's summary removal of contractors from the VIP database/decertification as improper. *See generally, Veterans Contracting Group, Inc., v. United States,* COFC No. 17-1015C (Dec. 15, 2017) (https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2017cv1188-34-0).

While not explicitly stated, it appears that the VA has now started to listen to the courts. In a Rulemaking issued on January 11, the VA seeks to make some degree of clarification on the priority for the VA's making contract awards to VOSBs. Interestingly, this Rulemaking would create a new regulatory scheme clarifying when a contracting officer must solicit competition under the Veterans First Contracting Program. While the Courts have read the existing law in conformance with the GAO, the VA traditionally, allowing other than competitive procedures under certain circumstances to allows contracting officers to award to VOSBs and SDVOSBs.