

THE VOSB SUMMARY: NEWS YOU NEED TO KNOW

(A Quarterly Publication for VOSBs: The Fall Edition)*



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The VA's Special Filing Cabinet (And Other Horrors)

For the record, LMP would love to cover any positive VA developments. Unfortunately, news lately has been grim. Here are the most recent scandals:

First, on August 17, an OIG Interim Report substantiated that the Los Angeles VARO staff was not following the VBA's January 2011 policy on management of veterans' and other governmental paper records, resulting in the OIG finding nine claims-related documents tossed in shred bins. Eight of these documents had the potential to affect veterans' benefits. (And this was during a random site visit - imagine what had already gone through the shredder!). This followed an anonymous tip that the Los Angeles VARO staff was shredding mail related to veterans' benefits. A special filing cabinet, for mail VA employees didn't feel like sorting. Access that report [here](#).

Second, according to a Freedom of Information Act request recently made by LMP, from January 1, 2013 through August 1, 2015, there have been 124 complaints made to the VA's OIG hotline alleging fraud under the Veterans First Contracting Program. During this same period, of these complaints, only three firms were prosecuted for fraud, and seven debarred (banned from federal contracting). Not much of a hit rate for the OIG hotline, but at the same time, there is such a thing of crying "wolf." Or mistaking someone for one.

Third, in mid-September, members

of an informal watchdog group consisting of current or former VA employees testified before a Senate committee regarding the VA OIG's failure to properly investigate claims concerning potential harm to veterans, including the Tomah, WI VA hospital's failure to investigate excessive opiate prescriptions prior to the death of Marine veteran, Jason Simcakowski. The watchdog group also cited acts of retaliation against VA employees who reported VA issues. In response, the VA OIG noted the serious discrepancy between the size of the workforce and the workload, noting that it investigates less than 10% of the 40,000 complaints it receives annually.

Fourth, the VA's Office of Special Counsel (OSC) found that VA employee and Army veteran Raymond Frink had been wrongly retaliated against (and fired) by the VA for seeking help in finding his lost disability claims file. It was lost for four months before Mr. Frink contacted his Senator for assistance in resolving the issue. His supervisor accused him of abusing vacation time and misusing his position to track down his file. The OSC recommended that Mr. Frink be given his job back and be given back pay, and recommended that the two supervisors who retaliated against him be disciplined.

Hopefully, with the next issue, there will be better news to report! Stay tuned . . .



OBAMA EXECUTIVE ORDER MANDATES SICK LEAVE FOR FEDERAL CONTRACTOR EMPLOYEES

On September 7, President Obama signed an Executive Order (EO) requiring federal contractors to provide “covered” employees with the ability to accrue at least seven days of paid sick leave per year. Starting in 2017, the EO will apply to new contracts, contract-like instruments, and solicitations. In addition, these contracts must be governed by at least one of the following: the Service Contract Act, the Davis-Bacon Act, or the Fair Labor Standards Act.

The EO only applies to covered contracts entered into on or after January 1, 2017. It directs the Secretary of Labor to issue regulations it deems necessary and appropriate to carry out the EO by September 30, 2016. These regulations will define the terms in the EO and set forth record keeping obligations for covered employees. It may also outline the Department of Labor’s authority to investigate potential violations and ensure compliance.

While many federal contractors already offer sick leave, and these regulations won’t come into play for at least a year, it’s important to know they’re coming . . . they may affect your bottom line.

Get Serious: Can VHA Leadership Fix A Broken System?

Last year, when VA Secretary Eric Shinseki resigned amidst numerous scandals, the person who took his place was not to be envied. No matter what he did, you can’t fix the VA overnight (or even in six months, or three years, or five. . .), but as the figurehead, the VA Secretary is an easy target for heated criticism.

Enter Robert McDonald, a former CEO of Proctor & Gamble. (“Call me Bob,” was a common refrain during the last NVSBE conference).

Poor “Bob” has problems that he had no hand in creating. With one scandal after another, veterans have lost faith in the VA in general. In fact, in a nationwide poll of 1,000 veterans and service members released in mid-October, veterans continue to overwhelmingly favor increasing health care choices for veterans and bringing accountability to the VA. This is despite the VA’s claims that it is already providing

veterans with adequate choices and taking steps to ensure accountability at the department. The poll results came only one day after a Democratic senator blocked legislation that would have allowed the VA to hold VA employees accountable for poor performance or misconduct.

During a House Veterans Affairs Committee hearing last week, a 4,000-page independent assessment of the Veterans Health Administration (VHA) razed the efficiency of the VHA. The assessment showed that Kaiser Permanente, another health care provider, is incomparably more efficient than the VHA. Kaiser has 114,000 fewer employees, yet provides care for 3.3 million more patients. Also, in terms of the number of appointments per day, VHA providers only see 10-12, while other providers can see almost double that amount. And this has nothing to do with demand - we’ve all heard the horror stories about horrific wait times.

When asked whether he agreed that there was a culture of silence

at the VA regarding an unwillingness to speak up about problems, Secretary McDonald stated: “Last September there were people unwilling to speak up. That’s why I’ve been to over 200 facilities. . . I am in the midst of a leadership crisis. That’s why I’ve brought on new leadership.” .

Secretary McDonald said there are five ways to fix the issue of a “culture of silence in the VHA:” *one*, get the right leaders in place; *two*, discipline retaliation against whistleblowers; *three*, ensure that 45 whistleblowers receive restitution; *four*, provide training on working with whistleblowers; and *five*, have town hall meetings.

It remains to be seen whether Secretary McDonald can effect these changes. This is a systematic problem; and even the best intentions and most comprehensive blueprint face the bureaucratic red tape that has plagued the VHA for decades.

False Claims Lawsuit Is Cautionary Tale for All SDVOSBs

On October 7, the U.S. Government filed a civil Complaint* against a company for damages and civil penalties arising from false claims made in connection to SDVOSB status. [The Complaint](#) is one worth looking at, because it gives a complete and comprehensive rundown of what, exactly, can happen if one goes the rent-a-vet route (installing a vet as the “owner” of a company *actually* run/benefited by non-vets). It is a cautionary tale for every SDVOSB competing for federal contracts.

The Complaint alleges that from 2008 through 2013, the Defendants – consisting of a corporation and three individuals, manipulated the SDVOSB Program and the Veterans First Contracting Program in obtaining \$24 million in SDVOSB set-aside contracts. (*U.S. v. Strock Contracting, Inc., et. al.*, 1:15cv00887). In a nutshell, in 2006 they created a corporation, Veteran Enterprises Company (VECO), and appointed a service-disabled veteran as its President and 51% owner.

At the time the individual was courted as the “veteran owner,” he worked full-time as a New York State Parole Officer, a position he held through 2013. The Defendants assisted VECO in obtaining its SDVOSB certifications (both self-certifications and through the VA), despite knowing that it did not qualify.

After VECO obtained its certifications, it successfully competed for a number of SDVOSB set-aside contracts. As set forth in the Complaint, during the next few years, the service-disabled veteran did little but sign the contracts and proposals presented to him (because, as anyone in the VetBiz registry knows, one element the VA scrutinizes is whether the veteran is signing these documents). He also acted as a figurehead in attending the pre-award and post-award meetings held by the contracting agencies, and performed inspections.

According to the Complaint, the service-disabled veteran earned a small portion of the monies reaped by this scheme, with Strock and the associated individuals reaping the vast majority of profits. In fact, he even earned less than the 5% he was promised. (This flies in the face of the regulatory requirements that the veteran be the highest-compensated employee).

In general, the Complaint states that: “[b]y diverting contracts and benefits therefrom intended for service-disabled veterans towards an ineligible company, defendants undercut the purpose of statutorily created programs to encourage contract awards to legitimate SDVO small business.” It goes on to provide a rundown of the eligibility requirements set forth by both the SBA’s SDVOSB Program, and the VA’s Veterans First Contracting Program. Its five Counts accuse the defendants of violating the False Claims Act by: presenting false claims, making or using a false record of statement, and conspiring

to submit/cause to be submitted a false claim or to make or use a false record or statement; as well as committing common law fraud and being unjustly enriched. It seeks millions of dollars from the Defendants, including treble damages associated with the false claims.

Because the Complaint comprehensively addresses the grounds for each claim, it’s helpful to understand what you’re *not* allowed to do. The LMP website provides a more detailed analysis (which you, hopefully, will never need. But if there’s ever a question...).

*The facts set forth in the Complaint are allegations only, and liability is yet to be determined.

KINGDOMWARE UPDATE!

As many VOSB owners know, the U.S. Supreme Court will hear the *Kingdomware* case, which addresses the VA’s obligation to set aside contracts off the Federal Supply Schedule for service-disabled veteran-owned small businesses. Since LMP’s last issue, several parties, including the American Legion, the Paralyzed Veterans of America, and the American Legion, have filed briefs of amicus curiae (“friends of the court”), for purposes of the November 9, 2015 oral argument.

Access the docket, briefs, and case details at: <http://www.scotusblog.com/case-files/cases/kingdomware-technologies-inc-v-united-states/>.



WE AVOIDED GOVERNMENT SHUTDOWN!

Right before the deadline of October 1 (the beginning of the fiscal year), President Obama signed a bill to fund the government through December 11, averting a shutdown and giving lawmakers about 10 weeks to negotiate a longer-term budget solution.

As many of you may remember, the last government shutdown went on for 16 days in 2013 and cost the U.S. economy about \$24 billion (especially since many gov't workers were paid for administrative leave, not to imply this was their fault in any way).

The push by Republicans to defund Planned Parenthood threatened a gov't shutdown. When push came to shove, however, Republicans removed the provisions relating to Planned Parenthood from the budget, resulting in Democrats' approval and ultimate approval.

Keep in mind, however, that this is not a permanent solution. If a longer-term budget solution is not reached within ten weeks, gov't shutdown may be a reality.

The Calamity Continues: What's New in Colorado?

The last issue of this newsletter covered the disastrous Colorado construction project on a VA medical facility, which, at last estimation, was \$1 billion over budget and more than a year behind schedule. In May of 2015, Congress approved an additional \$100 million to continue construction; and the completion date (once February of 2014) is now "unknown."

Upon further digging, I found that the construction company, Kiewit-Turner joint venture, filed suit before the Civilian Board of Contract Appeals (CBCA); and the CBCA found that the VA had breached its contract by failing to provide a design that could be built for the cost estimate. Consequently,

the CBCA allowed Kiewit-Turner to stop work because of the breach. At the time of the decision, a spokesperson for Kiewit-Turner noted that as designed, the project would cost more than \$1 billion.

After a long (long) delay, as of late September, construction of the estimated \$1.675 billion project (note - the initial estimate was \$328 million) now has the full support of Congress. The Senate agreed to a bill that would allow the VA to spend an additional \$625 million on project. The supporters include U.S. Rep. Jeff Miller, the chairman of the House Veterans Committee, who initially wanted the VA to cover part of the funding by siphoning \$200 million from a fund used to pay employee bonuses. He was so adamant about this approach that he

successfully blocked the Senate bill from going forward in the House.

Under pressure from other lawmakers, Miller agreed to back the funding. He did, however, engage in well-deserved public shaming of the VA, citing to recent waste by the Palo Alto VA health care system in spending \$6.3 million on art, to include an art installation on the side of a parking garage that cost \$285,000 in taxpayer money.

In the end, construction appears to be approved because veterans need a hospital as soon as possible. The VA might have grossly underestimated the cost of the project and supplied a defective design, but the most important thing is that veterans in Colorado receive proper medical care.



SBA RULE ALLOWS WOSB SOLE SOURCE CONTRACTS

Effective as of October 14, 2015, WOSB and EDWOSB sole source contracts are authorized under SBA regulations.

In a final rule published in mid-September, the SBA implemented regulatory authority pursuant to which contracting officers (COs) have discretion to issue sole source contracts. A CO may award a WOSB or EDWOSB a sole source contract of up to \$4 million (\$6.5 million for construction) when the following criteria are met: 1) the company is a “responsible” contractor; 2) the CO does not have a reasonable expectation that two or more WOSBs or EDWOSBs will submit offers; and 3) the award can be made at a fair and reasonable price. Sole source awards are limited to the same 133 NAICS codes under which WOSB and EDWOSB set-asides are authorized; however, the SBA is conducting a study to determine whether that list should be expanded.

While a big step for the WOSBs, the effects are yet to be seen. Maybe they’ll be reflected on the next SBA Small Business Scorecard (capturing contract dollars awarded in the different socioeconomic categories). Access the final rule [here](#).

Short Window! SBA Proposes Credit for Lower Tier Subcontracts

Pursuant to a rule published in the Federal Register on October 6, the SBA is proposing to amend its regulations to allow an other-than-small prime contractor subject to a subcontracting plan to receive credit toward its subcontracting goals for subcontract awards *made at any tier*.

Currently, a prime contractor only receives credit for awards made to first-tier subcontractors. The rule means that a prime contractor could grant a subcontract to a subcontractor, and that subcontractor could assign some of the work to a subcontractor and have that work count toward the prime’s subcontracting goals.

The rule also proposes to implement the statutory requirements related to the subcontracting plans of all *subcontractors* that are required to maintain such plans, including the requirement to monitor subcontractors’ performance and compliance towards reaching the goals set out in those plans as well as their compliance with subcontracting reporting requirements.

Further, the rule clarifies how socioeconomic status is determined at the subcontracting level. The prime contract’s NAICS code and size standard do *not* “flow down” to subcontracts. Under current law, a large prime contractor is responsible for assigning appropriate NAICS code and size standards to its subcontracts. The proposed rule takes this one step farther, requiring large prime contractors to assign NAICS

codes and size standards to *solicitations* for subcontracts.

One question this change raises is what the SBA means by the use of the word “solicitation” (as the rule refers to “solicitations for subcontracts”) - does the SBA actually assume that a prime contractor will solicit for subcontracts? As many of us know, most subcontracts issue based on business relationships.

If you have any thoughts on this rule, comments are due by December 7. Access the full text at: <https://federalregister.gov/a/2015-25234>.



VA Benefits Chief Resigns In Wake of Relocation Scandal

Allison Hickey, the VA Department's Undersecretary for Benefits, resigned last week amidst the newest scandal - one that resulted in the House Veterans' Affairs Committee voting to force five VA employees to testify about possible abuse of the agency's relocation program.

As the Undersecretary for Benefits, Hickey oversaw more than 20,000 VA employees and the delivery of benefits to more than 12 million veterans and their families. While she had many supporters, she had as many (and more vocal) detractors, resulting in some to call for her resignation in 2013 when the number of backlogged VA disability claims ballooned to over 600,000.

While VA departments have been careful to say that Hickey's resignation was her own doing, it comes only weeks after the OIG Report regarding the now-defunct relocation bonus program and in the wake of Republicans calling for her resignation. At issue are allegations from the VA's OIG office that senior executives misused interoffice moves to bump up their pay while reducing their job responsibilities, at a significant cost to taxpayers. The Veterans Benefits Administration spent more

than \$1.5 million on 21 questionable senior executive reassignments over the past three fiscal years.

The Report cites two cases specifically. The Philadelphia VA Regional Office Director is accused of receiving more than \$288,000 in moving expenses for switching from a job in Washington, D.C. to St. Paul Minnesota. Another VA Regional Office Director received nearly \$130,000 in a similar job switch scheme. The OIG found that the employees "inappropriately" used their positions of authority "for personal and financial benefit" by taking action to create the vacancies and then aggressively seeking the new openings.

Access the Report at: <http://www.va.gov/oig/pubs/VAOIG-15-02997-526.pdf>.

THANKS FOR READING!

Below: Wyatt & Archer, the Legal Meets Practical, LLC mascots



LEGAL MEETS PRACTICAL, LLC

ABOUT

My legal practice, based in the Atlanta area, is designed to help VOSBs participating in the federal arena. * I come from a family of both veterans and small business owners, and I understand the value in legal counsel who can clearly communicate while providing effective legal solutions. Hiring a lawyer should simplify your life, not complicate it.

MISSION STATEMENT

My mission is to provide accessible, high-quality legal services to small business owners and to veterans.

BLOG

If you found the information in this newsletter helpful, sign up for my weekly blog on veterans issues at: <http://www.legalmeetspractical.com>.

CONTACT:

Sarah Schauerte at: scs@legalmeetspractical.com or (703) 552-3220.

* I am licensed in VA and can assist with VA and federal matters.