THE VOSB SUMMARY: NEWS YOU NEED TO KNOW

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

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Coming Soon: The *Kingdomware* Decision!

As many veteran business owners know, the *Kingdomware* case pending before the U.S. Supreme Court was recently in jeopardy, as the Court ordered the parties to write briefs telling it why the issue at hand was not moot.

The *Kingdomware* saga is a hot button topic for many veteran-owned small businesses (VOSBs), as it illustrates the VA's occasional reluctance/failure to set aside government work for the very same group of individuals it is tasked to serve - the veterans. In a nutshell, the case began back in 2012, when the Government Accountability Office (GAO) sustained a slew of protests lodged by service-disabled veteran-owned small businesses (SDOVBSs) pursuant to the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the "Act"). The Act provides that before using Federal Supply Schedule procedures, a contracting officer must determine whether he has the reasonable expectation that: 1) two or more SDVOSBs will submit offers; and 2) the award can be made at a fair and reasonable price. If he does, he must set side the contract for SDVOSBs.

Basically, the VA had decided that despite this mandatory contract language ("shall" set aside. . . for SDVOSBs), it was not required to do so (or, in other cases, did not complete its market research).

After SDVOSBs found success before the GAO, the U.S. Court of Federal Claims sided with the VA, as did a federal district court.

This summer, the Court granted cert to *Kingdomware*, making it one of less than one percent of cases that are granted cert. Both sides filed briefs on the issues, but on November 4, the Court threw a wrench in the process: it ordered the parties to file briefs addressing whether the case was moot given that the contracts at issue have been fully performed.

Interestingly, the parties presented a united front in arguing that the case is not moot, and the Court should hear it. In briefs that were fairly similar, counsel for both sides noted that though the specific contracts at issue had expired, this issue will surely arise in future procurements (to use the legal jargon, they are "examples of controversies capable of repetition, capable of evading review).

As Kingdomware's brief pointed out, SDVOSBs have contested the VA's interpretation of the Act for nearly a decade. During that time - including the three and a half years the suit has been pending - Kingdomware and other SDVOSBs have repeatedly been deprived of the chance to compete on the terms Congress intended for a large number of VA contracts. As set forth in the brief: "Accordingly, this case represents the veteran-owned small business community's best and likely only realistic hopes of securing review from this Court to force the VA to comply with the law. The question presented urgently requires an answer from the Court."

Fortunately, on December 26, the Court agreed! The *Kingdomware* case is back o the Court's docket for oral argument on February 22.

OHA CONFIRMS IT'S NOT THE PLACE FOR *VA* SDVOSB STATUS PROTESTS

In a December decision, the SBA Office of Hearings and Appeals confirmed that the SBA lacks authority over eligibility determinations for VA set-asides. The lesson here? **If you lose a VA set-aside and don't believe the awardee is an eligible SDVOSB/VOSB, the proper place of jurisdiction is the VA Office of Small Disadvantaged Business Utilization (OSBDU), not SBA OHA.** *Size Appeal of In & Out Valet Company*, SBA No. SIZ-5696 (2015)

As OHA wrote, "under current law any SDVO status protest arising out of a VA solicitation will be decided by the VA OSBDU." OHA noted: "[A 2009 regulation] indicates that [the VA OSBDU's jurisdiction] will remain in place until an agreement is reached. . . to allow SBA to decide these protests. An agreement has yet to be executed. . . so VA OSBDU presently retains sole jurisdiction over SDVO status protests arising out of VA solicitations."

When will this "agreement" be reached? No intel on that, and this relates to the Government, so don't expect it any time soon.

BID PROTEST LESSONS

In an October decision, the GAO reminded offerors that in order to receive full proposal-writing credit, an offeror cannot merely restate the solicitation requirements.

In *Res Rei Development, Inc.*, B-410466.7, a contracting agency assigned the protestor an "unacceptable" score for its task order management plan. In explaining its evaluation under this subfactor, the agency noted that the plan was a direct re-statement of the Statement of Work requirement and failed to provide details and insight as to the actual execution of the plan.

In finding that that agency acted reasonably in excluding the protestor from the competitive range, the GAO noted "substantial similarity" between the solicitation's SOW and the protestor's proposal. Noting the "generic" language of the protestor's proposal, the GAO denied the protest.

The lesson here? Don't merely repeat contract requirements. Instead, give the evaluation team the specifics on how you meet the requirements, using solicitation terms as buzzwords.

In a December decision, the CBCA affirmed the necessity of appealing a final decision by a contracting officer (CO) to the CBCA within 90 days. As such, it is important that a contractor realize: 1) what constitutes a final decision; and 2) appeals it to the proper forum.

In *Bob L. Walker*, CBCA 4735 (2015), a contractor had been terminated for default on his contract for timber sale. After the contractor made several requests for weather-related contract adjustments and extensions (some of which were granted), the contract was ultimately terminated for default.

In the CO's final decision dated February 20, 2014, the agency assessed the contractor's damages associated with contract termination. The final decision notified the contractor that these amounts would be deducted from his final performance bond. The letter informed him that he had 90 days to appeal to the CBCA.

Rather than appeal to the CBCA, the contractor filed an appeal to the CO within 90 days. The CO responded and referred him to the appeal portion of his February letter, informing him that the proper appeal avenue was to the CBCA. The contractor took no action until he sent a second letter to the CO approximately seven months later. Again, the CO referred him to his appeal rights, and he responded by then filing an appeal with the CBCA. . . almost fifteen months after the original final decision.

In this case, thankfully the amount at issue was only a few thousand dollars. For other contractors, much more can be at stake, so this illustrates an axiomatic principle: know your deadlines to appeal a CO's final decision.

House Bill Shames VA For Letting Officials Keep Stolen Money

Despite the U.S. Department of Veterans' Affairs ("VA") vigorous campaign against *veterans* who erroneously receive benefits (whether through wrongdoing or not), two *VA officials* who allegedly defrauded the agency of $400,000 will walk away with the taxpayer money they took after receiving demotions and unspecified pay cuts as punishment.

Diane Rubens and Kimberly Graves were both accused of manipulating a VA program meant to relocate agency employees who transfer long distances to take jobs within the VA. Rubens fraudulently netted more than $274,000 and Graves more than $129,000, according to a VA Inspector General Report (the "Report"). That same Report recommended that the VA's Deputy Secretary consult with the Office of General Counsel to determine whether a bill of collection should be issued to recoup the monies paid for relocation expenses.

The VA claims, however, that it cannot recover these funds due to a "lack of legal authority." As such, it will not pursue recoupment. The VA's acting Undersecretary for Benefits Danny Pummill (note, former Undersecretary Alison Hickey ***resigned over this same scandal***) even said, "if I could go back in time, I still would have made all the moves" and blamed "the second and third order problems of the bonus program on the department moving too quickly to get the right people in posts that needed immediate improvements, to better help veterans."

Not only have Graves, Rubens, and others not been forced to give answers, but the VA concluded that the disciplinary action against Graves and Rubens violated their due process rights and is therefore instituting a "do over." On December 24, it was also announced that they will not face criminal prosecution.

Congress did not even get a chance to properly grill Ms. Rubens and Ms. Graves. In a recent hearing before the House Veterans Affairs Committee, both women refused to answer any committee questions on their alleged schemes to game the bonus program for personal gain, instead invoking their Fifth Amendment rights against self incrimination.

In a November 23 letter to VA Secretary Robert McDonald that crackles with rage, Jeff Miller, the Chairman of the House Committee on Veterans' Affairs, blasted the VA's failure to hold these employees accountable. As he stated: "[The] VA aggressively pursues the recoupment of overpayment of benefits to veterans, survivors, and other beneficiaries even when the overpayments are due to the VA's own error. I am sure you can appreciate the lunacy of a policy that is stricter on veteran beneficiaries of earned benefits compared to corrupt government officials who unjustly enrich themselves at taxpayer expense. It must not stand."

The letter asked the VA to reconsider its legal position, and to issue a response by no later than November 30. When the VA did not respond in time (by December 1), Congressman Miller introduced a House bill that would give the VA Secretary the authority to recoup relocation expenses from employees.

Miller's bill (H.R. 4138) would require the department to provide notice to employees of decisions to recoup relocation expenses, and give employees the opportunity to appeal the recoupment to a third party before having to repay the money. Mr. Miller is the same representative who introduced the VA Accountability Act of 2015, a bipartisan bill that would allow the secretary to demote or fire a VA employee for poor performance or misconduct. (This is not supported by VA Secretary Robert McDonald, and President Obama has also said he would veto the bill).

At the very least, H.R. 4138 is further public shaming of an agency caught in one scandal after another. The VA won't respond to a letter? Introduce a bill that gets press and public support.

Perhaps the bill will prompt the VA to reconsider its legal position, but probably not. Such action assumes a semblance of reason, logic, and accountability on behalf of the VA, and those have never been its strong points.

WINTER FRAUD ALERT

While I would love not to have news of procurement fraud to share, unfortunately the Department of Justice (DOJ) has been busy:

On November 2, the DOJ announced that NetCracker Technology, Corp. (Netcracker) and Computer Sciences Corp. (CSC) agreed to pay $11.4 million and $1.35 million, respectively, to resolve False Claims Act allegations that they used individuals without security clearances on Defense Information Systems Agency contracts. (The False Claims Act provided civil and criminal penalties for submitting false claims to the Government). As alleged by the DOJ, from 2008 to 2013, NetCracker allegedly used employees without security clearances to perform work when it knew the contract required otherwise, resulting in CSC recklessly submitting false claims for payment to the Government.

On November 10, the DOJ issued a press release that a husband and wife in Kansas were sentenced to 87 months and 20 months in prison, respectively, for misrepresenting the husband's status as a service-disabled veteran) to obtain $6.7 million in set-aside contracts through the federal government.

Three Big Changes to VetBiz Verification

As of late November, the VA's Center for Verification and Evaluation (CVE) has effected major changes in how it processes VetBiz applications.

First of all, in a new bifurcated verification process, the CVE is asking only for certain documents initially. These include resumes, corporate documents (bylaws or the operating agreement), and certificates of formation. Once the business gets through that hoop, it asks for the rest. The idea is to stop some businesses from wasting everyone's time in the event there is a true deal breaker that can't be fixed. Also, it gives businesses the chance to fix their corporate documents at the beginning of the process. It will, however, create delay by adding an extra step in the review process, which has been illustrated by the recent longer wait times.

Second of all, the CVE has published additional verification assistance briefs on common questions veterans ask during the process. These include the following issues:

*How your company can be eligible in the Veterans First Contracting Program if the veteran owns the company through a trust.

*What defines an operating agreement and its function.

*How a veteran owner can provide evidence of actual entitlement to receive 51% of the annual distribution.

*How to handle the SBA issuing a negative size determination against your company.

*Common bylaw provisions that result in an ineligibility provision.

*How a veteran in a community property state can demonstrate ownership/control of a company.

While these briefs are an improvement over those previously on the VetBiz site (some of which contained inaccurate or misleading information), don't use them as a substitute for legal advice or careful review of the regulations and applicable case law. Also, you will note that the briefs often merely reiterate the regulations and/or contain only general information.

Third of all, the VA has published proposed amendments to its regulations at 38 CFR Part 74, seeking to find an appropriate balance between preventing fraud in the Veterans First Contracting program and providing a process that would make it easier for more VOSBs to become verified. These were a long time coming, so if you have any comments to share, don't miss the January 5, 2016 deadline to comment! Access the proposed rule at: https://federalregister.gov/a/2015-28256.

SUCCESS RATES UP AT GAO

In its its Annual Report to Congress, the GAO provided a snapshot of the number of bid protests filed, sustain rates, and the most common reasons protests were sustained.

The Annual Report states that 2,639 cases were filed with the GAO in 2015, up from 2,561 in FY 2014. Of these, the GAO sustained a mere 12%, which, which at first glance, appears to be a terrible rate. However, of all protests filed before the GAO, the protestor received some form of relief in 45% of all actions.

This is what that means: at the GAO, it's hard to *win*, but a strong case might prompt the agency to work with you to receive a favorable result. As such, with proper research and supported by an informed decision, a GAO protest may be worth your while.

Access the Report at: http://www.gao.gov/assets/680/674134.pdf.

Attention Camp Lejeune Vets: Certain Disabilities to be Presumed Service-Connected

After a long fight, this December the VA announced that it will grant automatic benefits to veterans of Camp Lejeune if they suffer one of eight diseases, a decision that throws a lifeline to potentially thousands of people sickened by the base's polluted drinking water.

The VA announcement is an admission that the scientific evidence overwhelmingly points to these diseases being caused by pollutants found in Camp Lejeune water. Accordingly, veterans who lived on the base will get benefits without having to go through the arduous and prolonged claims process, which can take years and face high denial rates.

These illnesses, called "presumptives" in the parlance of the VA, are liver and kidney cancer, leukemia, non-Hodgkins lymphoma, multiple myeloma, scleroderma, Parkinson's diseases, and aplastic anemic (myelodysplastic syndromes).

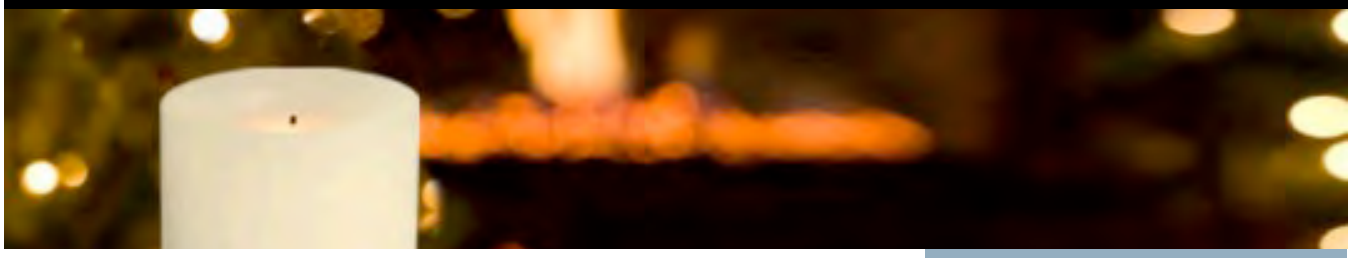
This follows a 2012 law, whereby the VA now *provides* health care to *veterans* and *reimburses* out-of-pocket expenses for *veteran family members* who suffered from one of fifteen health conditions. More information about that can be accessed at: http://www.publichealth.va.gov/exposures/camp-lejeune/. Also, a helpful public notice is here: http://www.va.gov/healthbenefits/resources/publications/IB10-449_camp_lejeune.pdf.

"The water at Camp Lejeune was a hidden hazard, and it is only years later that we know how dangerous it was," VA Secretary Robert McDonald said in a news release.

Scientists believe up to a million people may gave been exposed to a toxic brew of chemicals, including several carcinogens, that make the Lejeune contamination perhaps the worst-ever mass exposure to polluted drinking water in the United States. The contamination stretched more than 50 years, ending in 1987, and involved residents now scattered across the nation.

VA is working on regulations that would establish these presumptions, making it easier for affected Veterans to receive VA disability compensation for these conditions. **While the VA cannot grant any claims until it issues final regulations, it encourages veterans who have a record of service at Camp Lejeune between August 1, 1953, and December 31, 1987, and who developed a condition they believe is related to exposure to the base's drinking water, to file a disability compensation claim with VA.**

For more information, access the VA's press release at: http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2743.



SBA Seeks Public Comments on New WOSB Certification Program

Only a year after Congress eliminated the Woman-Owned Small Business (WOSB) self-certification program via the 2015 NDAA, the SBA now asks for comments on how to certify WOSBs. **These are due on February 16, 2016.**

In a notice published on December 18, the SBA stated that it intends to draft regulations to address the statutory change, and "seeks to understand what the public believes is the most appropriate way to structure a WOSB/EDWOSB certification program."

In the notice, the SBA notes that the Small Business Act allows four different types of WOSB certification programs: 1) by a federal agency; 2) by a state government; 3) by the SBA; and 4) by a national certifying entity approved by the SBA. The SBA seeks comments "*as to whether each of the four types should be pursued, or whether one or more of the types of certification are not feasible.*"

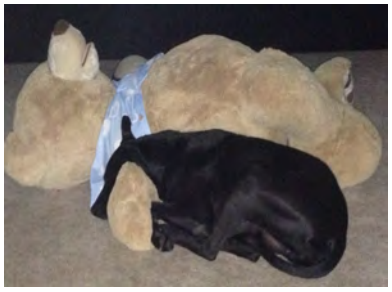
The SBA also requests comments "on whether there should be a grace period after implementation to give firms that have self-certified the time necessary to complete the certification process." Finally, the SBA wants public feedback on whether the WOSB repository "should continue to be maintained after the certification program is implemented, and if so, why and in what capacity should it be used in the future."

Regarding third party certifiers, the SBA's notice inquiries into a number of issues, such as how many third party certifiers are necessary and feasible, and whether there should be requirements to qualify as a third party certifier.

If you are a WOSB, this will affect you! It's worth chiming in. Access the rule and instructions on commenting at: https://federalregister.gov/a/2015-31806.

THANKS FOR READING!

Below: Archer, the Legal Meets Practical, LLC Mascot



LEGAL MEETS PRACTICAL, LLC

ABOUT

My legal practice, based in the Atlanta area, is designed to help growing VOSBs, particularly with protests, claims, and the VetBiz verification process 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.

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