

THE VOSB SUMMARY: NEWS YOU NEED TO KNOW (A Quarterly Publication for VOSBs: The Winter Edition)*



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No Conductor on this Train: Who Will Run the CVE?

By the time all protests are resolved, there might not be anyone left to take the reins of the VA's Center for Verification and Evaluation ("CVE").

In late November, the VA rescinded its September \$39.9 million contract award to Monterey Consultants Inc. ("Monterey") of Dayton, Ohio. That award, the bulk of which was for processing VetBiz applications, was protested by a disappointed offeror, Loch Harbour Group, Inc. ("LH"). LH alleged conflict of interest related to other work Monterey performs for the VA under different contracts, questions about Monterey's status as an SDVOSB, and concerns about how the proposals were evaluated. Its protest was pursued in the U.S. Court of Federal Claims ("CoFC").

In reaction to the protest, the VA confirmed that it would re-evaluate LH's proposal to determine whether the company qualified for the award. Monterey would no longer be eligible for re-award of the contract, according to the filing. Unhappy with this development, Monterey filed its own suit in the CoFC on December 3 protesting the VA's decision to no longer consider Monterey eligible for the contract.

Not long after that - less than a week, in fact - the VA itself filed a size protest with the SBA challenging LH's status as an SDVOSB and therefore eligible for the set-aside opportunity. This is

despite the fact that LH was re-verified by the CVE less than ten months ago; and that the VA (as the contracting agency) determined it eligible for the award during the contract evaluation process. Counsel for LH, Lee Dougherty of Vienna, Virginia, has been quoted as saying that this is: "a terrible tactical move," and that "[t]he retaliation taken by the program and contracting officer is absolutely inappropriate and a gross violation."

A terrible tactical move or not, technically it's allowed. Under the SBA's rules on size protests, a contracting officer may initiate a size protest. 13 CFR 121.1001. And unlike size protests lodged by disappointed offerors, which must be filed within five days of receiving a Notice of Unsuccessful Offer, a contracting officer can do it at any time. 121 CFR 121.1004.

So here we are. Monterey is knocked out of line for the award, and LH's eligibility is being questioned by the VA itself. The VA already had months and months to question LH's status. So why now?

One thing's for certain. The VA's good at getting flak. But for those of you going through verification or reverification, don't worry about the CVE's operations coming to a screeching halt. Monterey will most likely receive a bridge contract until the protests are resolved.



VA FIRINGS BEGIN WITH SHARON HELMAN

On November 24, the VA formally removed Sharon Helman, the director of the Phoenix Healthcare System, from federal service. Ms. Helman's removal follows the recent scandals plaguing the VA, which culminated in the enactment of the Veterans Choice and Accountability Act to overhaul the VA.

In May of 2014, following allegations that up to 40 veterans had died awaiting medical appointment and that prolonged patient waits were purposely hidden, several Arizona Congressmen in a coordinated effort signed a letter calling for Ms. Helman's removal. An investigation by the VA's Office of Inspector General later confirmed these concerns, which were memorialized in a report that was published on the VA's OIG website on August 26, 2014. Access the report here: <http://www.va.gov/oig/pubs/VAOIG-14-02603-267.pdf>.

CBCA Discovery Sanctions Reward VA for Bad Behavior

On November 13, the CBCA sustained a contractor's motion for discovery sections against the U.S. Department of Veterans' Affairs, denying reasonable legal fees but permitting the contractor to access the VA's computer system to collect electronically-stored information ("ESI") that is responsive to discovery requests but the VA failed to produce. *Brasfield & Gorrie, LLC v. VA*, CBCA 3300 (November 13, 2014).

In an Order that is effectively a six-page admonition of the VA, the CBCA noted: "as B&G has comprehensively documented, the VA's response to B&G's discovery requests has been discourteous to B&G, has violated repeated

promises made to B&G and the Board, and has disregarded Board orders." In fact, the VA had failed to meet every single discovery deadline set by the CBCA.

In granting sanctions against the VA, the CBCA noted that under CBCA Rule 33, it has the power to sanction parties for unacceptable behavior. It cannot, however, impose monetary penalties. While it explicitly agreed with B&G that the VA's conduct had been egregious, rejecting the VA's cited excuse for non-compliance as "technical difficulties," it stated: "no matter how egregious discovery abuses may be, we may not impose monetary sanctions on parties for committing them."

This Order effectively holds that because the VA has failed to comply with discovery or to

provide justification for its behavior, it will hand-hold it through the process to make sure it gets done. In the Order, it mandated the parties to propose to the CBCA, by no later than Monday, December 1, the name of an independent third party that will perform the task of compiling the ESI required by discovery.

This means that while the VA's conduct was terrible in numerous respects, inhibiting progress on resolving the contractor's claims for nearly \$50 million on a medical center construction project, it is not only not being punished for its behavior, but the end result is an order arranging for someone else to do the discovery work for it.

Access the Order at http://www.cbca.gsa.gov/files/decisions/2014/DANIELS_11-13-14_3300_BR

CoFC Case Educates CVE On Its Own Rules

In a landmark case, the U.S. Court of Federal Claims held that the VA's Center for Verification and Evaluation ("CVE") denied due process to a Service-Disabled Veteran-Owned Small Business ("SDVOSB") by revoking its "verified" status without proper notice and also unreasonably interpreted its own rules on unconditional ownership.

For companies that want to do set-aside work with the VA, the CVE is the gatekeeper. The CVE examines applications to the Veterans First Contracting Program, assessing whether a business has shown that it meets the requirements of being both "owned" and "controlled" by a veteran. As you might guess, these terms are very loaded.

In this case, [*Ambuild Company, LLC v. U.S.*](#), an agency-level protest was lodged against Ambuild, an SDVOSB. No. 14-1786 (October 10, 2014). Even though neither the protestor nor the contracting officer raised an issue with whether Ambuild was unconditionally owned by a veteran, the CVE decided to investigate this on its own. The CVE determined that the veteran was not an "unconditional owner" because of an "involuntary withdrawal" provision contained in the company's operating agreement. Ambuild was never given an opportunity to address this issue before it was de-verified and removed from VetBiz. As such, the CoFC determined

that this violated Ambuild's rights to due process.

This is the part that is cringe-worthy. The provision the CVE found unacceptable required a member to involuntarily withdraw from the company if the member "is adjudged bankrupt or insolvent or there is entered against the [m]ember an order for relief in any bankruptcy or insolvency proceeding." While the VA claimed that this provision would terminate the veteran's ownership shares upon the occurrence of any type of personal bankruptcy, the CoFC found that this argument was "inconsistent with federal bankruptcy law." Regardless of what the operating agreement says, in the event of bankruptcy, the veteran's ownership interest would go to the bankruptcy estate. Accordingly, the CoFC held that this clause is a standard commercial arrangement that does not run afoul of the SDVOSB "unconditional ownership" requirements.

Upon reading this case, I was surprised the CVE reached this interpretation of the unconditional ownership provision given that in *all* fifty states, as a matter of law, a member's interest must revert to the company if certain events occur (such as death or incapacity, and in many cases, bankruptcy). This is not something you can draft around in an operating agreement. It is fairly common for operating agreements to have a provision, in the "transfer" section, that says that a member's interest shall revert to the company "as a matter of law." Because this is so common, I took a look at the [CVE's Verification Brief on](#)

["unconditional ownership."](#) and saw that it did not address this situation.

What happened here? Does the CVE not realize what situations are encompassed in "as a matter of law?" Obviously that term *means* something. Here, poor Ambuild got into trouble because it included additional detail. This makes little sense, as the CVE routinely comes across this "as a matter of law" provision in the operating agreements submitted to it. The examiners should know what "as a matter of law" entails.

This should be a wake-up call for the CVE. Companies are entitled to due process (See [38 CFR 74.22](#) and [48 CFR 819.307](#)) before their "verified" status is revoked. And the CVE must be reasonable in interpreting its own regulations. In that way, this CoFC decision is similar to a 2012 decision, [Miles Construction](#), which held that a "right of first refusal" transfer restriction is permissible given that it is a standard commercial arrangement.

What do you think? Will this inspire change, or will this be more of an "academic" victory for SDVOSBs?



SENATOR'S HOLD THREATENS CLAY HUNT VETERAN SUICIDE LEGISLATION

Veterans groups and military associations are blasting a move by Senator Tom Coburn (R-Oklahoma), intended to scuttle a veterans' suicide prevention bill that has already passed in the House with strong bipartisan support.

In mid-December, the lawmaker put a hold on the \$22 million bill, which he opposed on grounds it has no offsets in spending elsewhere and would duplicate existing VA programs. At this point, it is still waiting Senate approval.

The Clay Hunt Act would speed up access to mental health care to veterans, including reservists, boost VA efforts to hire more psychiatrists, and review all current VA mental health programs for effectiveness. It is named after Mr. Clay Hunt, a marine who committed suicide after coming home from Iraq and Afghanistan with PTSD.

Access the bill/track its progress at: <https://www.congress.gov/bill/113th-congress/house-bill/5059>.

Secretary McDonald Announces Massive VA Health Overhaul

The chief of the VA is preparing sweeping changes to the agency in response to the scandals that were discovered earlier this year. Because of government bureaucracy, however, the changes will not go into effect for some time.

Secretary McDonald outlined his plan in a November interview with "60 Minutes" on CNN. According to the interview, at least 35 people will be fired and more than 1,000 are facing "aggressive, expeditious" disciplinary action. The names of the 35 employees were given to the VA committees in both the House and the Senate and all firings have to go through a judge.

These changes are in response to a massive cover-up that dated back to at least 2000, in which VA health employees lied on medical records to hide the fact that hundreds of thousands of veterans were waiting months for medical care.

A whistleblower initially brought the issue to the forefront, reporting that veterans may have died while waiting for treatment at a VA hospital in Phoenix. (The director of that center, Ms. Susan Helman, was removed in late November). Appointment records were changed to hide the extensive wait times. After the initial report, several more problems in VA hospitals across the country came forward, demonstrating that the falsified documents were part of a pervasive issue with the

system. The VA's OIG also investigated more than 90 hospital across the country that showed similar patterns, concluding that the practice was widespread.

As noted by Ronald Abrams, the joint executive director at the National Veterans Legal Services Program, "we wouldn't be in this place if people had done their jobs and there was proper oversight."

Poor Secretary McDonald. As much as he wants to make changes in this broken system, it's hard to be truly effective when you're being strangled by red tape.

Access his interview on CNN at: <http://www.cbsnews.com/news/robert-mcdonald-cleaning-up-the-veterans-affairs-hospitals/>.



VA OIG Semiannual Report Released

The VA's OIG recently released its semi-annual report, capturing the activity of the OIG from April 1 through September 30, 2014. This reports a busy time for the OIG - it issued 195 reports and 22 memoranda on VA programs and operations. The semi-annual report summarizes the various inspections conducted by the OIG, and it can be accessed at: <http://www.va.gov/oig/pubs/sars/VAOIG-SAR-2014-2.pdf>.

If you are interested in receiving automatic notifications by email when new reports or other information is posted on the OIG web site, go to <http://www.va.gov.oig.email-alerts.asp>. and click on "sign up to receive email updates."

The GAO: Where Recommendations Actually Mean Something

The one disadvantage to protesting agency contract action at the Government Accountability Office ("GAO") is that GAO decisions aren't binding or mandatory - they're effectively advisory. A contracting agency doesn't have to follow them (although if it does not, it must explain why). But based on the GAO's annual report released to Congress on November 18, 2014, it's clear that this "disadvantage" doesn't really exist, as in Fiscal Year 2013, every single contracting agency facing a sustained GAO protest elected to implement the GAO's recommendation, with only one exception.

In case you're curious, this one case involved the Air Force's effort to implement its Food Transformation Initiative

without following applicable competitive procedures. The protestor successfully argued that the Air Force had improperly invoked the public interest exception under 10 U.S.C. 2304(c)(7), which led to the unreasonable justification of using a Memorandum of Agreement to implement the Food Transformation Initiative. *Asiel Enterprises, Inc.*, B-408315.2, (September 5, 2013).

The GAO's annual report also addressed the government shutdown's effect on protest resolutions. As noted, during this time, the GAO extended bid protest deadlines by one day for each day the GAO was shut down. When the federal government shut down on October 1, there were 280 active bid protest cases in progress. Because the government shutdown lasted for 16 days, the bid protest deadlines were extended for a maximum of 16 days.

Last, the annual report gave us the skinny on statistics: how many protests before the GAO were successful? According to the annual report, of the 556 protests decided on the merits (i.e., not denied for timeliness or procedural issues), only **13%** (72 protests) were sustained.

However, we should keep in mind that these figures don't account for the instances where an agency took corrective action on its own initiative following a GAO protest, resulting in the protest being dismissed as moot. This means the success rate isn't truly 13%; according to a chart on page seven of the report, 43% of all protestors received some form of relief from the agency (such as voluntary corrective action). Not too shabby.

Access the GAO's report [here](#).



Impressions from the VA's National Veterans Small Business Engagement

From December 9th through the 11th, the VA hosted its National Veterans Small Business Engagement in Atlanta, GA. This gave veteran-owned small businesses the chance to meet with procurement officials, network with prospective teaming partners, and attend learning sessions on federal government contract topics. (I had the pleasure of presenting one of these sessions, covering teaming strategies for VOSBs/SVOSBs looking to partner with non-veteran businesses. Access the slides at: <http://www.legalmeetspractical.com/why-choose-us/sdvosb-resources/presentations/>).

From the beginning, the conference had issues with organization - registration did not open until mid-October, and the speakers did not receive the date and time of their presentation until the Friday before the conference. (Also, there was no way for speakers to upload their presentations electronically - the links sent by the VA did not work). Keynote speakers were not chosen prior to the conference, and some registrants experienced issues in confirming their booths.

Despite these problems, for the most part, it seemed that conference-goers found the experience worthwhile.

Attendance was down from prior years but still in the thousands, and many of the large contractors that offer subcontracting opportunities to VOSBs were present. The CVE had a booth and offered several learning sessions on the verification process, veterans' organizations such as NVSBC and NaVOBA were in full force, and the exhibit hall was full. Long story short - even if the execution wasn't perfect, the NVSBE offered a lot of good resources for VOSBs pursuing federal work.

Dates and venue have yet to be announced for NVSBE 2016.

THANKS FOR READING!

Below: Archer and Wyatt, the Legal Meets Practical, LLC Mascots



LEGAL MEETS PRACTICAL, LLC

ABOUT

My legal practice, based in the Atlanta area, is designed to help growing VOSBs, particularly with 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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