

GETTING VERIFIED: EVERYTHING YOU SHOULD KNOW BEFORE THROWING YOURSELF DOWN THE VETBIZ GAUNTLET

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If you find this publication informative, sign up for Sarah Schauerte’s legal blog on timely veterans issues at: <http://www.legalmeetspractical.com>!

Why this Publication Exists

As a veterans attorney and advocate who specializes in applications to the VA's Veterans First Contracting Program (the CVE's VetBiz portal), I know how baffling this process can be for the veteran business owner. The eligibility requirements are nuanced, the CVE's guidance can be confusing and/or inconsistent, and the document requests are tedious.

From going through the process so many times, it's now second nature. I know the answers to questions that have veterans scratching their heads, and I thought it would be beneficial to consolidate them all in one spot for easy reference. I hope this saves veteran business owners a lot of time and headache.

This guide isn't designed as step-by-step instructions for getting verified – every situation is different, and it would be misleading to represent that every business can follow steps 1, 2, 3, and TADA – verified! Rather, this guide is intended to contain as much information as possible which has practical value to the veteran business owner seeking verification. Take what you need/what is relevant to you and leave the rest.

About the Author

Sarah Schauerte is an attorney whose practice is dedicated to helping veteran-owned small businesses grow. Sarah's work is almost entirely in the field of federal procurement, with a focus on assisting businesses obtain verification in the VA's VetBiz Verification Program, and she has spoken on this subject for a number of national veterans organizations. Legal Meets Practical also specializes in contracts disputes and in the drafting and negotiation of legal documents that have all the required legal protection and provisions without the incomprehensible language.

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General Facts About the VA's VetBiz Verification Process

1. What is the VA Veterans First Contracting Program?

The Veterans First Contracting Program within the Department of Veterans Affairs (VA) is a contracting program created for both Veteran-Owned Small Businesses (VOSBs) and Service-Disabled Veteran-Owned Small Businesses (SDVOSBs). Approved businesses are eligible to participate in VOSB and SDVOSB set-asides issued by VA. They are also eligible to subcontract with VA's large prime contractors in acquisitions where additional evaluation credit is given for such subcontracting relationships. They were once able to participate in the VA's Veteran-Owned Small Business Mentor-Protégé Program, but this program will expire at the end of December 2014 (access more information about this at: <http://www.va.gov/osdbu/entrepreneur/mpp.asp>).

2. What are the VA VetBiz Vendor Information Pages (VIP?)

The VA VetBiz Vendor Information Pages (VIP) is a database that lists all businesses that have been verified as VOSBs and/or SDVOSBs by the Center for Verification and Evaluation (CVE), which is the VA office charged with the verification process. A business must be listed in the VIP database in order to compete for a VA set-aside opportunity for veteran businesses. VA contracting officers will check this database in order to determine whether a business is eligible for an issued set-aside contract. You can search the VIP yourself at: <https://www.vip.vetbiz.gov>.

3. What is VA VetBiz verification?

Verification is the process by which the CVE determines whether a business is eligible to participate in the Vets First Contracting Program. (A business deemed eligible is "verified" as opposed to "certified," which is the terminology used for Small Business Administration programs).

4. Is VA VetBiz verification required for non-VA contracts?

As of now, VetBiz verification is **not** required to compete for VOSB and SDVOSB set-asides issued by federal agencies other than the VA. However, the Federal Aviation Administration has adopted a regulation requiring VetBiz verification for its SDVOSB set-asides, and there has been conjecture that the VA's VetBiz Verification Program may ultimately apply government-wide. When this happens, the Small Business Administration will likely administer the program instead of the VA. There have been several bills introduced in the House designed to prepare for the transition to the SBA. The first, titled the Improving Small Business Opportunities for Service-Disabled Veteran-Owned Small Businesses, was introduced on August 1, 2013. (Access an overview of the bill at: <http://www.legalmeetspractical.com/bill-introduced-in-house-asks-va-to-hand-over-vetbiz-to-sba/>).

For immediate purposes, however, verification will probably not be required for other federal procurement opportunities for at least three years (as of December 2014). This is

due largely in part to the fact that the CVE is still developing the verification process. Also, while there are plans for the SBA to take over the process, the timelines proposed by the House bills provide for much flexibility in reaching different milestones.

5. Is my business is denied verification, will a contracting officer be able to see that in the VetBiz Registry?

No. Contracting officers will only be able to confirm whether or not a business is listed and the date of the verification's expiration.

6. What are the eligibility requirements for a business to become verified?

Businesses eligible to participate in the Veterans First Contracting Program must meet the VA's definition of a "service-disabled veteran-owned small business" or a "veteran-owned small business." An SDVOSB is a business that is "not less than 51%...owned by one or more service disabled veterans, or in the case of any publicly owned business, (has) not less than 51% of the stock owned by one or more service disabled veterans, the management and daily business operations of which is controlled by one or more service-disabled veterans, or, in the case of a veteran with a severe and permanent disability, a spouse or permanent caregiver of the veteran." An SDVOSB also must qualify as "small" under the applicable NAICS code. A VOSB meets substantially the same definition, with the absence of the provisions referring to service-disabled veterans.

7. What does "veteran-owned" mean?

The VA defines "ownership" within its Veteran-Owned Small Business Verification Guidelines, which are contained at 38 CFR Part 74. "Ownership" is defined at 38 CFR 74.3, which provides that in order for a business to be "veteran-owned," the veteran must unconditionally and directly own at least 51% of the business. As this definition is nuanced, veteran business owners should review the regulation at:

<http://www.law.cornell.edu/cfr/text/38/74.3> and the VA's Verification Assistance Briefs on ownership issues at <http://www.va.gov/osdbu/verification/assistance/briefs.asp>.

As a (very important) note, in determining whether a business is veteran-owned, the CVE will scrutinize the business' corporate documents, which must clearly demonstrate veteran ownership. Two clauses of corporate documents that cause frequent issues with demonstrating veteran ownership are transfer restrictions and withdrawal of members.

8. What does "veteran-controlled" mean?

The VA defines "control" within its Veteran-Owned Small Business Verification Guidelines, which are contained at 38 CFR Part 74. "Control" is defined at 38 CFR 74.4: "'Control' means both the day-to-day management and long-term decision-making authority." As this definition is nuanced, veteran business owners should review the regulation at: <http://www.law.cornell.edu/cfr/text/38/74.4>, as well as the VA's

Verification Assistance Briefs on control issues at:
<http://www.va.gov/osdbu/verification/assistance/briefs.asp>.

In determining whether a business is veteran-controlled, the CVE will scrutinize the business' corporate documents, which must clearly demonstrate veteran control. Corporate documents must: show that the veteran is the highest-ranked officer, contain language demonstrating how the veteran controls the day-to-day operations and strategic policy, and must make it clear that important company decisions cannot occur without the veteran's presence **and** consent.

9. What are some common “control” issues that can prevent my business from being verified?

Even if your corporate documents are written perfectly, there are still some issues that can prevent a company from being verified. Common issues include, but are not limited to:

- Dependence on non-veterans or non-veteran-owned entities - This can come up in a number of ways. Two common examples are if the business is sharing equipment or office space with another business; or if it is using resources or money furnished by a non-veteran owner.
- Outside Employment – If a veteran has outside employment (not an unusual situation given the large number of startup businesses), this might create a challenge in showing the veteran is able to devote himself full-time to the business.
- Delegating Authority – If non-veterans are delegated “management” tasks, this might impede the veteran’s ability to control the business. Examples include if non-veterans are listed on the bank’s signature card or if a non-veteran manages an office location.
- Acting Remotely – If a veteran does not live in the vicinity of the office location, the veteran must show that this does not impede his ability to manage the business. This is generally done by explaining how alternate modes of communication are employed.

10. What are the benefits to VA VetBiz verification?

Approved firms are eligible to participate in VOSB and SDVOSB set-asides issued by VA. They are eligible to subcontract with VA’s large prime contractors in acquisitions where additional evaluation credit. They were also eligible to participate in VA’s Veteran-Owned Small Business Mentor-Protégé Program, but this is now defunct (see <http://www.va.gov/osdbu/entrepreneur/mpp.asp>). Also, being able to claim SDVOSB or VOSB status may be an effective marketing tool as it relates to pursuing both teaming opportunities and civilian contracts.

11. Are there any prerequisite requirements to applying for verification?

Keep in mind that to participate in the Veterans First Contracting Program, a company must be both registered in the D&B Bradstreet database (ie, have a D-U-N-S number) and the SAM.gov database. A business must first have its D-U-N-S number before it can register in SAM. Access these websites at:

<https://iupdate.dnb.com/iUpdate/viewiUpdateHome.htm> (D&B) and <https://www.sam.gov> (SAM).

12. Where do I apply for verification?

Businesses may apply for verification in the VA VetBiz Verification Program at:

<http://www.vetbiz.gov>.

13. What documents must I submit with my VA VetBiz verification application?

A veteran-owned business must submit a number of documents with its electronic application, including: financial documents, corporate documents, required licenses, and resumes of key personnel. If any required documents are missing, or not necessary for the veteran-owned business, it must submit a Letter of Explanation (LOE). Also, if the documents submitted raise an issue with eligibility (for example, if a resume reflects outside employment, or if the bank signatory card reflects that a non-veteran is a signatory), an LOE must be submitted in that instance as well. As a rule of thumb, it is best to keep an LOE as simple and as concise as possible. A list of required documents may be accessed on the VetBiz website at:

<https://www.vip.vetbiz.gov/Public/Register/DocumentList.aspx>.

Also keep in mind that the CVE has recently been requesting documents that are not on the list, as the CVE reserves the right to request follow-up documents it deems necessary to confirm eligibility. For example, the CVE might ask for a DD-214, Certificates of Good Standing (if it can't verify good standing on the state's website), and 1099 tax information.

Further, be aware that there is no alternative (or recourse) to a veteran business owner who is uncomfortable with providing certain information to the CVE, such as a tax return. Some veterans have been able to successfully redact certain tax/financial information if they properly follow (**and cite to**) the guidance of NIST Special Publication 800-122, IRS Publication 1075, and OMB M-10-23 and OMB Memorandum M-07-1616. CVE examiners/evaluators are supposed to follow these guidelines.

14. Where can I go for assistance with VA VetBiz verification?

The VA offers a number of resources and training tools to assist with the verification process. These include:

- The VA's Verification Assistance Briefs, which clarify the rules associated with 38

CFR Part 74. These briefs are based on an analysis of issues that cause the majority of denials. **However, verification counselors have found numerous errors and inconsistencies with these briefs.** Access the briefs at: <http://www.va.gov/osdbu/verification/assistance/briefs.asp>, but please exercise caution when using them.

- The VA's Verification Self-Assessment Tool, which enables veteran business-owners to do a comprehensive review of the entire VA regulation and check their business models against the requirements of 38 CFR Part 74. Access the self-assessment tool at: http://gcctech.fluidsurveys.com/s/Verification_Self_Assessment_Tool/.
- The VA's Verification Counseling Program, which was developed to assist business owners to understand 38 CFR Part 74, guide them through the Verification Self-Assistance tool, answer questions, and help them address issues in their application. The CVE claims on its website that these counselors receive the same training as CVE evaluators; however, this training (from my personal experience) consisted of one day of training that focused more on the verification process (ie, the steps to verification) rather than the eligibility nuances that are pertinent to whether a verification is successful. Access the listing of counselors at: <http://www.va.gov/osdbu/verification/assistance/counselors.asp>.
- In addition, business owners often elect to hire an experienced attorney or consultant to help them with the preparation and submission of their application.
- LinkedIn and public forums. Many businesses have gone through the process and have war stories and practical tips. If you have a specific question, it's likely that someone will be willing to help you based on personal experience. But know that though their experience might sound analogous to yours, there might be a factual distinction that makes a difference to the CVE in assessing eligibility.

What to Expect From the VetBiz Process

1. What are the different stages of the verification process, and what do they entail?

There are four (formal) different stages of the verification process: initiation, examination, evaluation, and determination. Businesses spend the longest period of time in the examination stage, which is where the CVE “audits” the business and asks clarifying questions to determine that the business is owned and controlled by a veteran.

First, a business will have to fill out the CVE’s Form 0877. To do this, you must have on-hand the social security number and birth date of any veterans with an ownership interest in the business (even if they are not the veteran upon whom eligibility is based). Also, keep in mind that with the 0877, you must list the name of a veteran as it is reflected on the DD-214. (ie, no nicknames). This means that although the 0877 form does not currently include a place for a middle name, you will need to squeeze the middle name in the line for the first name to make it match the DD-214.

After all electronic signatures have been submitted, the stages to verification are as follows:

- Initiation – This stage is what it sounds like. The CVE will examine an application for completeness and ask for any documents necessary to review an application for eligibility. Keep in mind that the CVE will always ask for more documentation at this stage. Also, failure to timely provide information will result in the CVE withdrawing the application. You can reapply at any time.
- Examination – This stage is where a CVE examiner will examine (hence the name) an application for purposes of making a recommendation of approval or denial. During this time, the applicant will be required to provide additional documentation, as well as answer questions that probe eligibility issues (such as whether the veteran has outside employment, the roles played by individuals involved with the business, and affiliation with other businesses). Applications spend the longest period of time in this stage.
- Evaluation – This is effectively a “quality check” of the examiner’s recommendation, where the CVE reviews and cross-checks the examination report against the supporting documentation.
- Determination – This is where the CVE determines whether an application should receive one of three letters: an approval letter, a pre-determination letter, or a pre-decision letter. An approval letter is exactly what it sounds like. A pre-determination letter is where the business is given five days to correct minor issues (in order to receive an approval letter). A pre-decision letter is where the business is effectively forced to withdraw its application to fix “deeper” eligibility issues before reapplying.

2. After I submit my application, will the CVE ask for additional documentation?

Yes, so don't be alarmed. The CVE will always (*always*) ask for more information during the initiation and examination stages, and this isn't an indication that anything is necessarily wrong with your application. In the initiation stage, the CVE will examine your application for thoroughness and ask for anything that is missing. In the examination stage, where the CVE conducts its audit for veteran and ownership and control, it may (will) ask clarification questions and for follow-up documents. Keep in mind that with these requests, the CVE will give you a time to respond (ie, upload the documents). If you do not upload the documents in time, the CVE will withdraw your application. Extensions are never given.

3. How long will I wait for a verification determination?

The VA recently published on its website a table that lists average verification processing times. According to the table, as of FY 2015 it takes an average of **43 days** upon receipt of a complete application for the CVE to make an initial determination. (Access the table here: <http://www.va.gov/osdbu/verification/statistics.asp>). It should be noted, however, that this number is incredibly skewed. When a company has to withdraw its application (which happens if the CVE asks for a document it cannot produce, or if the CVE makes a pre-decision finding of ineligibility), that company is not included in the statistics. Even more impactful, every time the CVE asks a company for additional documentation, the clock stops. **The CVE always asks for additional documentation.**

Some issues may slow applications. These include: failure to submit all required documents, inconsistent information in the application compared with the System for Award Management (SAM) or available in public data, and the need for clarification or additional information.

4. What are my chances for a successful verification?

The VA recently published on its website a table that lists verification success rates. According to the table, 92% of applicants are verified. (Access the table here: <http://www.va.gov/osdbu/verification/statistics.asp>). **HOWEVER**, this number is effectively meaningless, as the VA has implemented new "pre-decision" and "pre-determination" processes where, rather than accepting a denial, a business may withdraw its application. As there is absolutely **no** incentive for accepting a denial, most/all veterans will opt to withdraw their business. In this case, the application is not counted as a denial in the CVE's posted statistics. Because of these new processes, it is very difficult to determine the "real" verification rate.

Everything relating to VetBiz is very facts-specific. Keep in mind that your chances for a successful verification depend largely on the preparation you invest in your application and the individual circumstances surrounding your business.

5. What is the pre-determination process?

The pre-determination process allows businesses to fix "easily correctable" issues with their corporate documents instead of immediately receiving a denial letter. **These are drafting errors, not eligibility issues (eligibility issues would include issues with non-veteran control, outside employment by the veteran, etc.).**

The CVE will notify the business of the problematic clause(s), and the business will be able to fix those clauses and resubmit the corporate document via its VetBiz portal. The business must notify CVE within 48 hours of the decision to take part in this process; and it must submit the required corrected documents within five business days.

This process helps businesses not be denied based on a technicality. However, businesses should be very careful if they choose this process, as it is a one-shot opportunity. CVE will only review corrected documents once, and if they do not pass muster, the business will have to withdraw its application and go through the process all over again. I am aware of one situation where a business forgot to sign the document they corrected, and rather than accommodate the company and allow them to resubmit, the CVE required them to withdraw and then spent nearly two months to verify them.

6. What is the pre-decision process?

The pre-decision process allows SDVOSBs and VOSBs to withdraw their applications rather than receive a denial letter. **This happens when the issue(s) precluding an approval are not simple drafting fixes, but a "deeper" eligibility issue (such as concern with a non-veteran's involvement).** The CVE will send a business a notification stating that it has completed an evaluation of its application for verification, but the "findings" of that evaluation include issues that preclude verification. Accordingly, the business can choose to do nothing and receive a denial, or it can choose to withdraw its application. The decision to withdraw must be communicated to the CVE within 48 hours, and then the withdrawal must be completed within 48 hours.

If the business chooses the denial, it can then either request reconsideration within thirty days or reapply after six months. (This option has no incentive, as a request for reconsideration will take much longer to process than the option to withdraw and resubmit).

If the business chooses to withdraw, it will be able to immediately resubmit after correcting the issues identified in the CVE's findings enumerated in the pre-decision letter. As these findings may include more serious issues, such as dependence on non-veteran entities or the failure to meet the full-time employment requirement, the business should take the time to understand the basis for ineligibility and how to correct the problems with its application to the CVE's satisfaction.

7. If verification is denied to my business, what are my options?

If verification is denied to your business, you have two options: 1) wait six months to

reapply; or 2) file a request for reconsideration within 30 days of receipt of your Notice of Rights letter (denial letter). The request for reconsideration process (which follows only a denial) is now almost obsolete because of the new pre-determination and pre-decision processes. Unless a veteran fails to check his email and the deadline to respond to a pre-determination or pre-decision letter passes, a denial is very rare.

Legal Meets Practical's Best Practical Tips for Getting Verified

1. Assess your situation.

There are a number of basic eligibility problems that will give businesses a big hurdle to being verified. These are discussed above – like when a non-veteran contributes a lot of capital or holds a necessary license, or when the veteran has outside employment. These eligibility issues can be dealt with in one of two ways: 1) drafting a carefully-drafted Letter of Explanation that includes “buzz words” from the regulations to adequately explain away the issue; or 2) not applying for verification (if the eligibility issue is a true deal-breaker, which hopefully isn't the case) until/if the eligibility issues can be resolved. If you do your homework beforehand, you'll prevent yourself from wasting your time one way or the other.

2. Look at your corporate documents.

Issues with corporate documents are a big reason why businesses get denied verification. These are the multi-member LLCs or multi-owner corporations, because specific provisions of corporate documents have to read a certain way in order to prevent eligibility issues. When you apply, do not use corporate documents you got on the Internet.

This may be frustrating, given that many small businesses (especially family-run) don't really *use* their corporate documents, but the fact of the matter is that they must be written in a certain way or you'll find yourself in the pre-determination phase (where you have five days to figure out and fix the problem, or go through the process all over again).

3. Be organized.

For those going through the VetBiz process, being organized will save you a lot of headaches. This will help you identify any gaps in your application so you don't get a documentation request from the CVE that literally asks two dozen questions and for two dozen documents (I've seen this happen). Before you begin, take a look at the documents required for your business type. Make a list of what you need, along with what you have and what you don't have. With what you **have**, put it in a folder and label it with the appropriate section number (for example, since taxes go in Section 2.1, label those for 2012 “2.1_Taxes_Veteran_2012.”). That way you know where, and what, everything is. With what you don't have, draft a Letter of Explanation stating as such: what you don't have, and why. Label it clearly, too – for example, “3.1_LOE_Operating_Agreement.”

4. Less is more.

A lot of veterans with good intentions find the need to explain more than what is necessary, answer questions in greater detail than what is asked of them, or provide documents that are not specifically asked for. Do not do this, because it will clutter up

your VetBiz portal (ie, your examiner will be bogged down with irrelevant documents), and you might make a statement that will get you in trouble. I have seen situations where veterans have unknowingly used terminology that has a “loaded” meaning by the CVE. Even though their business was truly eligible, because they phrased a statement a certain way, it gave the impression that they had eligibility issues and they were denied on this basis.

On a similar token, answer the question. If the CVE asks you a question that bears on affiliation (ie, “what is your relationship with X business?”), answer it carefully, clearly, and fully. If you don’t, you might find yourself in the pre-decision process because you didn’t explain yourself well enough.

5. Letters of Explanation are your friend.

If you are missing a document or need to explain something, include a Letter of Explanation. Some of these can be really short and simple (for example: “An operating agreement has not been uploaded to the VetBiz portal because our business does not have one. It is a corporation and therefore uses By-laws to govern its operation”). Others need to be more carefully thought out, such as a Letter of Explanation that explains - in great detail and using buzz words from the regulations - how a veteran’s outside employment doesn’t interfere with his ability to manage and control the applicant business on a full-time basis.

6. Clearly label your documents.

When you upload your documents to your VetBiz portal, each one goes in a specific section. Make sure your documents are: 1) included in the right section; and 2) are clearly labeled (for example, 2.1_Veteran_Taxes_2012). If you don’t, you risk the examiner missing the document and therefore asking for it; and you’ll find yourself on the phone with the CVE.

7. Redact, because no one else will do it for you.

The VetBiz portal does not allow you to upload password-protected documents. This means that if you upload your tax returns with your social security number, while the CVE states that this is a “secure” portal, the fact of the matter is that you have uploaded your tax returns with your social security number to an electronic portal. And once you hit “submit,” there’s no removing a document.

Hopefully there will never be a security breach of documents uploaded to VetBiz portal, but one should always be careful. Remove social security numbers and other identifying information from tax returns and other sensitive documents.

8. Promptly reply to any requests for documentation.

When you are in the Initiation and Examination stages of the VetBiz process, the CVE will ask for more information. Always. I have never seen an application where the CVE

did not ask for more information in these stages, regardless of how great a job the business did with compiling its information. When this happens, the CVE will give you a date by which you must comply with their request. Comply with it, or your application will be withdrawn (or in some cases, denied, depending on what stage of the process you're in – for instance, you'll receive a denial if you get a letter inviting you to participate in the pre-determination or pre-decision process and you forget to respond).

9. Put important dates on your calendar.

This mainly has to do with reverification. 120 days before your VetBiz listing expires, you should get an email from the CVE telling you that you can begin the reverification process. However, sometimes these emails go to spam, and if you wait too long to reverify, your listing could either expire (if you forget entirely and you don't initiate the process before the end of your verification period), or you'll have a gap between when your old verification expires and when your new verification period begins.

10. Be sure before you hit “submit.”

Once you hit “submit,” you can't take it back. Everything that you've put in your portal is submitted and can never be deleted by you.

Also, if you still have documents to upload and you accidentally hit “submit,” you'll have to call the CVE Help Desk. It's not a catastrophic problem, but it is an inconvenience, and it's easy to do because the yellow “submit” button looks just like the “next” button you see in prior pages of your VetBiz portal as you input your information.

Reporting Changes to a Verified Business

1. What changes are businesses obligated to report?

According to the approval letters sent to verified businesses, they are required to “inform CVE of any changes or other circumstances that would adversely affect its eligibility.” This is extremely generally-worded, and the phrase “that would adversely affect” makes it sound like a business is only required to tell the CVE when something happens to make it no longer eligible for the Veterans First Contracting Program.

2. When must a business report any changes?

Within 60 days of the change(s).

3. How must a business report changes?

While approval letters do not contain contact information for reporting changes (other than “contact the CVE”), changes may be reported by emailing the CVE at vip@va.gov. Always remember to include your DUNS number in any correspondence.

4. What are the penalties for not promptly reporting changes?

Eligibility changes not reported to the CVE within 60 days could result in a referral to the Office of Inspector general (OIG), a referral to the Debarment and Suspension Committee, and the initiation of cancellation proceedings.

Reverification

1. How long does verification last?

Verification is good for two years from the date of approval.

2. When can I reverify my business?

You can begin the process within 120 days of expiration. The CVE will send out reminders 120, 60, and 30 days before the expiration of their verification. If you initiate the process well ahead of time and are successfully verified before your expiration, your new verification period begins as of the date you successfully renewed (ie, you technically “lose” that time).

3. What about simplified renewal?

Simplified renewal no longer exists, and there is debate over whether it ever did exist. Through simplified renewal, businesses confirmed that they had gone through no changes since the last time they were verified, and received an approval letter only a week later. However, businesses had to meet specific criteria to be eligible to complete this process, and I know of no businesses that did so.

In the summer of 2014, the CVE did away with simplified renewal and issued a Fact Sheet about the reverification process. Access more information about this development at: <http://www.legalmeetspractical.com/they-shot-the-unicorn-cve-kills-simplified-renewal/>.

4. What is the general process?

The steps for reverification are as follows:

- Login to VIP.
- Under Actions in the Account Summary, click “Reverify.”
- Update owner information and sign a new VA Form 0877
- Review the previous application and update all necessary documentation.
- Click “Submit”
- Complete the questionnaire to verify any changes in ownership/control.
- The process then follows the same stages as an initial verification.

5. What documents do I have to submit for reverification?

You must submit the exact same documents submitted during your last verification process. This means that you must go through every section of your application and update your documents. If there are no documents to update, provide an LOE to that effect (for example: “1.1_LOE_License. No updated license has been provided with this VetBiz reverification application. The document that was uploaded on XX/XX/XXXX with our prior VetBiz application is current.”)

6. Does reverification take less time than verification?

No. Reverification might be a bit easier on your end because you will have a better idea of what to submit and what needs to be updated, but your application will still go through the same stages of evaluation at the CVE and be in the same queue for examination as the initial verification applications.

VetBiz Cancellation Procedures

1. What is “cancellation?”

Cancellation is rare, but it happens. This is when something happens to prematurely yank a business from the VetBiz registry before the end of its two-year verification period. This might happen because a size protest revealed an eligibility problem, because a veteran dies or abandons the company (and the CVE finds out about it), or because of some other event that establishes a business as ineligible for the Veterans First Contracting Program.

2. What are the procedures for cancellation?

First, when CVE believes that a participant's verified status should be cancelled prior to the expiration of its eligibility term, CVE will notify the participant in writing. The Notice of Proposed Cancellation Letter will set forth the specific facts and reasons for CVE's findings, and will notify the participant that it has 30 days from the date it receives the letter to submit a written response to CVE explaining why the proposed ground(s) should not justify cancellation.

Second, following the 30-day response period, the Director of the CVE will consider any information submitted by the participant. Upon determining that cancellation is not warranted, the CVE will notify the participant in writing. If cancellation appears warranted, the CVE makes a decision (signed off on by the Director) whether to cancel the participant's verified status.

Third, if it is decided that cancellation is warranted, the CVE will issue a Notice of Verified Status Cancellation. The Notice will set forth the specific facts and reasons for the decision, and will advise the concern that it may re-apply after it has met all eligibility criteria. At this point, the business will be withdrawn from the Program and may reapply once it meets all eligibility criteria.

3. Can a business appeal the CVE’s decision to cancel its verified status?

A participant may file an appeal with the Executive Director, Office of Small and Disadvantaged Business Utilization and Center for Veterans Enterprise, concerning the Notice of Verified Status Cancellation within 30 days of receipt of CVE's cancellation decision.

4. What happens to the Veterans First Contracting Program contracts a cancelled business is currently performing?

A cancelled business may (and is obligated to) finish the set-aside contracts it is currently performing. However, the business' cancellation may affect the VA's decision to exercise an option year.

Common Eligibility Issues Every Business Should Consider Before Running the Gauntlet

1. Corporate Documents: The Big Problem Areas

First and foremost, if you are a veteran solo member owner/member of a business, you don't need to worry much about corporate documents. The main problems veterans encounter occur when a non-veteran is in the mix, and therefore the corporate documents must be carefully crafted to ensure that no eligibility issues emerge.

Keeping in mind that while there is some flexibility regarding how your business is structured and organized, your corporate documents absolutely must contain the following elements:

Highest Ranked Officer – The veteran must be in the highest-ranked office, and the corporate documents should ideally note that it is the highest-ranked. Also, in the position description, it is helpful if it states that the veteran is tasked with “managing the day-to-day operations and long-term strategy.”

Quorum – When it comes to voting on company action, the documents must read in a way that this cannot happen without the veteran's presence. For example, if a business is a corporation and directors manage the business, the veteran must be a director and the bylaws must say the veteran must be present to vote on company action.

Voting Requirements – Similarly, the corporate documents must read so it is impossible for company action to be approved without the veteran's consent. Usually companies get in trouble when they inadvertently include voting requirements that require unanimity or a super majority.

Requisite Ownership - For a business to be “veteran owned,” the veteran must own 51% or more of the business. This can be done by reflecting in the stock ledger (corporation) that the veteran has 51% of all outstanding stock; or by reflecting in the operating agreement (limited liability company) that the veteran has 51% of all interest.

Transfer of Interest – Because the veteran ownership must be unconditional, there can be no limits on a veteran's ability to transfer ownership (other than death, incapacity, or by law). The CVE's regulations do allow “right of first refusal” provisions, where a veteran owner must give the first shot of buying his interest to other owners, but the SBA's SDVOSB program does not permit that.

2. Full-Time Employment (Outside Employment)

Outside employment is perhaps the most problematic issue because of the lack of substance to define the CVE's bright-line “full-time” requirement.

The CVE's regulations read that a veteran must devote “full-time” to a business during

the regular hours of a business of that nature. It does not define "full-time," and this term is absent from the SBA's regulations relating to its SDVOSB program. There is also no standard for what the veteran must prove in order to establish that he works "full-time" for the company. Accordingly, for a company where the veteran does work elsewhere, the CVE's evaluation of outside employment can sometimes truly go either way.

If the veteran upon whom eligibility is based works at another job, he must show how he is still able to manage the applicant business on a "full-time" basis. A Letter of Explanation addressing this should include at least the following: the amount of time each week spent at the applicant concern, the duties performed at the applicant concern, why the outside employment doesn't interfere with responsibilities to the applicant concern, and why working odd hours is "normal" for a business of that nature (assuming the veteran is engaged elsewhere during "regular" office hours). While the regulations do not state that a veteran must work the traditional 40 hours per week for the applicant, the CVE appears to consistently interpret "full-time" to mean "40 hours."

Again, whether the explanation will pass muster is fact-specific. Be as detailed as possible and remember to use buzzwords from the applicable regulation (38 CFR §74.4).

3. Delegation of Authority

In business, it makes sense for a business owner to delegate responsibilities to senior staff members. However, when a business operates this way, it is important to be cognizant of how this can be perceived by the CVE. If an employee other than the veteran signs proposals, is included on the bank signature card, acts in an executive function, and makes long-term decisions, the CVE might take this to mean that the veteran is not "controlling" the company. Accordingly, Letters of Explanation may be required to show how delegation of tasks is done for the benefit of the business and "under the veteran's direction, authority, and approval, with the veteran always retaining authority and control over all daily and long-term business decisions." (The excerpt in quotes is key language to use, but again, whether a delegation of authority passes muster is fact-specific. You may be noticing a theme here...).

4. Control by Non-Veterans

For example, if a company receives a sizable capital contribution from a non-veteran owner, this may show undue influence. The CVE will also look into members' involvement with other companies or individuals to determine whether these relationships affect the operation of the company or its business decisions. For example, if a company is a father-son enterprise where the father is a non-veteran, if he allows the son to use commercial space and equipment he owns to start up his new business, the CVE may find undue influence by a non-veteran (the father) unless an explanation is given that can adequately explain how the help doesn't impair the son's ability to exercise independent business judgment. **Always, the determination is fact-specific.**

5. Working Remotely

In the electronic age, and especially because so many companies use virtual offices, many company members work remotely. If this is the case, the veteran will need to explain how the practice of members working remotely does not interfere with the veteran's ability to control the company. Again, this is a fact-specific determination. However, both the CVE and the United States Court of Federal Claims (CoFC) have held that there is substantial leeway in allowing veterans to operate remotely: in *KWV, Inc. v. U.S.*, 12-882C (2013), the CoFC upheld the CVE's determination that a veteran controlled his Rhode Island-based company even though he spent six months of the year in sunny Florida. In that case, the CoFC noted that the veteran had no other jobs, was able to conduct work electronically and via telephone, and traveled to Rhode Island when face-to-face meetings were necessary.

6. Veteran As Highest-Compensated

The veteran must be the highest-compensated of those who are tasked with managing the business (stockholders, partners, limited liability members, officers, or directors). 38 CFR §74.4(g)(3). If this is not the case, the business must submit a Letter of Explanation detailing why another managing individual earning more compensation is in the “best interests of the applicant firm.”

Keep in mind that this requirement applies only to managing members. If your business has issues with the CVE pushing back because a 1099 consultant or other employee is earning more money than the veteran (most commonly because they are supporting a contract with an unanticipated need), cite to 38 CFR §74.4(g)(3) to say that this requirement does not apply to your situation. To be safe, however, also explain why this individual's salary is in your business' best interests. (You should not have to do this, but since this rule may be misinterpreted by the CVE this will protect you).

Special Issues

1. Veterans with multiple businesses in the VetBiz registry.

As an initial matter, there is no rule against a veteran owning more than one business that is listed in the VetBiz registry. In drafting its final regulations relating to control, the VA specifically determined that two companies owned and controlled by the same veteran may be listed in VetBiz. As stated by the VA when publishing the final rule in the Federal Register on January 19, 2011: “We agree that restriction of only one business participant may have the unintended effect [of running contrary to White House policy statements in support of small business and would stifle job creation and economic development]...Accordingly, the rule has been modified to allow more than one VOSB participant so long as the veteran can demonstrate the requisite requirements of ownership and control.” Access the Federal Register publication here: <http://www.gpo.gov/fdsys/pkg/FR-2011-01-19/pdf/2011-983.pdf>.

Even though there is no blanket prohibition on one veteran having two companies in the VetBiz registry, proceed with extreme caution in attempting verification of two companies. With respect to each, you will have to show that your involvement with the one does not interfere with your ability to control the other on a full-time basis. It is possible for a veteran owner to successfully verify one business, only to potentially face cancellation procedures when he later attempts to verify a second business and asserts he is managing it “full-time.”

2. Community property

Community property states include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. (Puerto Rico is a Community Property Territory). If your business is not in one of the states, this consideration does not apply to you.

When it comes to ownership of a business, the CVE takes into account state community property rules. If a Veteran owner resides in any of the community property states or territories and is married, the Veteran is presumed to only own an undivided half, (i.e., 50%), of the property acquired during the marriage. 38 CFR §74.3(f). This means that if the business is a solo proprietorship with the veteran as the only owner, in a community property state the veteran will be considered to only own 50%.

In order to address this issue, a veteran business must provide documentation proving that the veteran’s spouse has given up a sufficient percentage of his or her ownership to provide that the veteran owner has 51% unconditional ownership. This can be in the form of a document executed between the veteran and the spouse.

3. Trusts

To be listed in the VetBiz registry, a business must be *directly* owned by a veteran. Under the applicable regulation, “an applicant or participant owned...by a trust that is in turn owned by one or more veterans or service-disabled veterans does not meet this requirement. However, ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by a veteran or service-disabled veteran where the trust is revocable, and the veteran or service-disabled veteran is the grantor, a trustee, and the sole current beneficiary of the trust.” 38 CFR §74.3(a).

Without the legalese, this means that in order to pass muster with the CVE, trusts must meet the following requirements:

- The trust must be revocable.
- The veteran must be the grantor, a trustee, and the sole current beneficiary of the trust.
- Documentation must be provided which makes it clear that all of these requirements have been met. The Trust Agreement must be provided, if ownership is based on a Trust.
- Because the trust must be revocable, the Veteran must be able to take back full control of the trust property at any time. While there can be more than one trustee, the Veteran must be a trustee and the sole current beneficiary. To be the sole current beneficiary, the Veteran must receive the full income or other distributions from the trust property.
- Having named beneficiaries who will receive benefits or distributions from the trust property only after the Veteran’s death or incapacity does not conflict with the regulation, as the firm would no longer be eligible in the event either scenario occurs.

4. Caregivers

A “service-disabled veteran-owned small business concern” can be a business where the management and daily business operations are controlled by the caregiver of a severely disabled veteran. 38 CFR §74.1. However, the CVE’s regulations do not define what is a “caregiver” or how this individual is designated as such. I have seen determination letters that refer to 13 CFR §125.8 when addressing caregiver situations, which is curious given that these regulations apply to the Small Business Administration’s SDVOSB program and not the VA’s Veterans First Contracting Program (and are not cross-referenced). This regulation provides that a permanent caregiver “is the spouse, or an individual, 18 years of age or older, who is legally designated, in writing, to undertake responsibility for managing the well-being of the service-disabled veteran with a permanent and severe disability, to include housing, health and safety.”

At any rate, this means that when applying for listing in the VetBiz registry, a veteran business owner must show that:

1. A spouse or another individual is legally designated, by VBA or a court or administrative agency authorized to make such designations, to undertake responsibility for managing the veteran's well-being;
2. The spouse or other individual is the sole permanent caregiver; and
3. The veteran has been determined by the VA, in writing, to have a permanent and total service-connected disability as set forth in 38 CFR §3.340 (the same as for purposes of receiving disability compensation or a disability pension).

Keep in mind that when a caregiver is the individual managing the business on a daily and long-term basis, that individual "steps into the shoes" of the veteran for purposes of showing "control" in the corporate documents. This caregiver must be the highest-ranking official, and his or her presence must be necessary to establish a quorum to vote and to pass any company action.

All of the provisions relating to ownership, however, remain the same (ie, the corporate documents must show that the veteran, not the caregiver, unconditionally and directly owns 51% of the business). It is unclear whether the veteran must still be the highest compensated, but this can be addressed by explaining how the caregiver receiving a higher salary is beneficial to the business. 38 CFR §74.4(g)(3).

4. "Pseudo" caregivers

This is an unusual situation, but it exists. This generally occurs when a veteran does not have a caregiver who is legally recognized, but has a family member who assists the veteran to enable him to run the company on his own. This is most common when it comes to veterans with issues such as traumatic brain injury or post-traumatic stress disorder. In essence, this pseudo caregiver provides a sheltered environment for the veteran.

The trouble with pseudo caregivers is their existence might make the CVE believe that the veteran does not have the ability to, or is not, "controlling" the operations of his business. This might occur because the veteran is delegating too much work to the pseudo caregiver, or because the pseudo caregiver is the individual the employees report to or who makes important company decisions.

Accordingly, if a business has a veteran who is assisted by a family member due to the veteran's illness, it is important to show how that family member helps *the veteran* run his business. Show how that pseudo caregiver provides a sheltered environment for the veteran to allow him to control the day-to-day-operations. There is a difference between doing that, and having work delegated to the pseudo caregiver to the extent the veteran no longer controls the business. As always, whether you can show that this non-veteran's involvement enables (rather than precludes) a veteran from controlling his business is a facts-based determination.

5. Affiliation

The CVE's regulations provide that "non-veterans or entities may be found to control or have the power to control...when "[b]usiness relationships exist with non-Veterans or entities which cause such dependence that the applicant or participant cannot exercise independent business judgment without great economic risk." 38 CFR §74.4(i)(4). They also provide that the CVE applies the same affiliation rules as those applied by the SBA at 13 CFR §121.103. 38 CFR §74.5. Affiliation exists when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.

Basically, these provisions mean that businesses seeking verification must be careful when they are receiving some form of support from a non-veteran or non-veteran business, such as equipment, facilities, resources, shared contracts, and same employees. **The CVE will look at this support with scrutiny, and if the VetBiz applicant does not explain how the support does not enable the non-veteran or non-veteran business to control the VetBiz applicant (or have the power to control the applicant), the CVE will find that the VetBiz applicant's ability to exercise independent business judgment is compromised.**

As a note, in its Verification Assistance Brief published on its website, the CVE enumerates a number of examples of evidence that will support a finding of dependence on a non-veteran or entity. These are as follows:

- The applicant is receiving business resources necessary to operate, such as employees, equipment, office and/or warehouse space, at little or no cost to the applicant, and absent a VA-approved mentor-protégé agreement (See VA Acquisition Regulation 48 CFR Chapter 8, Subpart 819.71).
- The Veteran is a current employee or recent former employee of a minority owner; or, the Veteran lacks experience/knowledge with respect to controlling the applicant compared to minority ownership.
- The applicant is a franchisee where mandatory requirements of how to operate various aspects of the business are outlined in the franchise agreement by the franchisor entity in order for the applicant to continue operating as a business franchisee.

6. Joint Ventures

First and foremost, know that joint ventures must be verified with the CVE as a separate legal entity. If you have a VetBiz-verified business and want to team up with a non-veteran business to form a joint venture, you will have to go through the VetBiz process all over again. You will form a joint venture between your company and the non-veteran company, get a D-U-N-S number, register in SAM, and go through the VetBiz process anew.

To pass muster with the CVE, you will have to prove that this joint venture meets the CVE's ownership and control requirements.

Under the CVE's definition, a "joint venture" is an association of two or more small business concerns to engage in and carry out a single, specific business venture for joint profit, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally." In determining whether a joint venture is "unconditionally owned" by a veteran, the CVE will look to whether a veteran (or service-disabled veteran) is entitled to receive "at least 51 percent of the net profits earned by a joint venture in which the applicant or participant is the lead concern." 38 CFR §74.3(d)(2).

As it relates to control, the CVE's regulations make no mention of joint ventures in the applicable regulation. 38 CFR §74.4. However, the CVE cites to the SBA's regulations (13 CFR Part 125) in its Joint Venture Verification Assistance Brief, which outline the requirements a joint venture must meet to be eligible for the VetBiz registry. One of these requires that the SDVOSB (or VOSB) be designated as the managing venturer of the joint venture, and that an employee of the managing venturer be named as the project manager responsible for the performance of any set-aside contract issued.

In addition, the Joint Venture Assistance Brief enumerates the following standards that must be met by a joint venture for it to be eligible for verification:

- A joint venture must be a separate legal entity
- A joint venture must be controlled by a verified VOSB or SDVOSB concern
- A joint venture must be separately verified
- The SDVOSB or VOSB must earn at least 51% of the profits earned by the joint venture
- In every joint venture, at least one of the businesses must be a verified VOSB/SDVOSB, in accordance with the Verification Program requirements found in 38 CFR Part 74.
- The verified VOSB/SDVOSB must be the Managing Venturer of the applicant and have control over all decisions of the joint venture.
- Additionally, all joint venture agreements must contain the provisions stated in 13 CFR §125.15(b)(2).

The VA's rules on joint ventures are at VAAR 819.7003, which you can access at: <http://www.va.gov/oal/library/vaar/vaar819.asp - 8197003>.

*That's all for now! The VetBiz Verification process is constantly changing, and this Guidebook will be updated accordingly. To stay up to date on these changes – and other topics of interest to veteran small business owners - sign up for Sarah Schauerte's blog at: <http://www.legalmeetspractical.com>. Remember to click on the link sent to your email to activate your subscription!