

**VERIFIED, SIMPLIFIED:  
EVERYTHING YOU SHOULD KNOW ABOUT VETBIZ  
VERIFICATION**

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## **Why this Publication Exists**

As a veteran attorney and advocate who specializes in applications to the VA's Veterans First Contracting Program (the CVE's VetBiz registry), I know how baffling this process can be. 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 information with practical value to the veteran business owner seeking verification or reverification. Take what you need/what is relevant to you, and leave the rest.

## **About the Author**

I am an attorney whose practice is dedicated to helping veteran-owned small businesses grow. My 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. I have spoken on this subject for a number of national veteran organizations, including the National Veteran Small Business Coalition and the National Veteran-Owned Business Association. I also routinely handle contracts disputes, draft corporate documents, represent companies in claims before contract appeals boards, and prepare/negotiate legal documents related to federal government contracts (such as teaming agreements, subcontracts, non-disclosure agreements).

## **Table of Contents**

<b>General Facts About the VA’s VETBIZ Verification Process .....</b>	<b>5</b>
What is the VA’s Veterans First Contracting Program?.....	5
What are the VA VetBiz Vendor Information Pages (VIP)? .....	5
What is VA VetBiz verification?.....	5
Is VA VetBiz Verification required for non-VA contracts? .....	5
If my business is denied verification, will a contracting officer be able to see that? .....	6
What are the eligibility requirements for a business to become verified?.....	6
What does “veteran-owned” mean? .....	6
What does “veteran-controlled” mean? .....	7
What are some common “control” issues that can prevent verification? .....	7
What are the benefits to VA VetBiz verification? .....	8
Are there are prerequisites requirements to applying for verification? .....	8
Where do I apply for verification? .....	8
What documents must I submit with my VA VetBiz application ? .....	8
Where can I go for assistance with VA VetBiz verification? .....	9
<b>What Do the VetBiz Stages Entail? .....</b>	<b>11</b>
What is the o877 and how do I fill it out? .....	11
What’s this I hear about trouble with selecting NAICS codes? .....	11
What are the formal stages of the verification process, and what do they entail? .....	11
After I submit my application, will the CVE ask for additional documentation? .....	12
How long will I wait for a verification determination? .....	12
What are my chances for a successful verification? .....	12
What is the Post-Review Findings program.....	13
If verification is denied to my business, what are my options?.....	13
<b>Legal Meets Practical’s Top 10 Tips for Getting Verified .....</b>	<b>14</b>
Assess your situation .....	14
Look at your corporate documents .....	14
Be organized .....	14
Less is more .....	14
Letters of explanation are your friend .....	15
Clearly label your documents .....	15
Redact, because no one else will do it for you .....	15
Promptly reply to any requests for documentation .....	16
Put important dates on your calendar .....	16
Be sure before you hit “submit” .....	16
<b>Reporting Changes to a Verified Business .....</b>	<b>17</b>
What changes are businesses obligated to report?.....	17
When must a business report any changes?.....	17
How must a business report changes? .....	17

What are the penalties for not promptly reporting changes?.....	17
<b>Reverification .....</b>	<b>18</b>
How long does verification last?.....	18
When can I reverify my business? .....	18
What is the general reverification process? .....	18
What documents do I have to submit for reverification? .....	18
Does reverification take less time than verification? .....	18
<b>VetBiz Cancellation Procedures .....</b>	<b>19</b>
What is cancellation?.....	19
What are the procedures for cancellation? .....	19
Can a business appeal the CVE’s decision to cancel its verified status? .....	19
What happens to the Vets First contracts a cancelled business is performing? .....	19
<b>VetBiz Audits .....</b>	<b>20</b>
When may the CVE audit a VetBiz-verified business?.....	20
Why will the CVE audit? (ie, should I panic?).....	20
What is the audit process? .....	20
Can I prepare?.....	20
What happens if I don’t provide documentation in time?.....	21
What happens if the CVE finds eligibility issues? .....	21
Will the verification period start over upon successful completion of an audit? .....	21
<b>Common Eligibility Issues .....</b>	<b>22</b>
Corporate documents: the big problem areas .....	22
Full-time employment (outside employment) .....	22
Delegation of authority.....	23
Control by non-veterans.....	23
Working remotely .....	24
Veteran as highest-compensated.....	24
<b>Special Issues.....</b>	<b>25</b>
Veterans with multiple businesses in the VetBiz registry .....	25
Community property .....	25
Trusts.....	26
Caregivers .....	26
“Pseudo” Caregivers .....	27
Affiliation .....	28
Joint ventures .....	28

## **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 expired at the end of December 2014. Now the SBA maintains an All Small Mentor-Protégé program, but a firm need not be veteran-owned to participate. Learn more here: <https://www.sba.gov/federal-contracting/contracting-assistance-programs/all-small-mentor-protege-program>.

### **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, this is in the process of changing. *First*, a proposed rule acknowledges that the 2018 NDAA states that the SBA will be designated as the federal agency responsible for creating regulations governing ownership and control. As such, the rule proposes to remove six definitions from 38 CFR Part 74.1 (the definitions governing the VA's program), as well as clarify that the verification period is in fact three years (not two). *Second*, another rule proposes to consolidate the regulations and definitions that apply to both the SBA's SDVOSB

Program and the VA's Veterans First Contracting Program.

In a nutshell, these two proposed rules have been established toward the end of establishing one set of regulations to apply to VOSBs and SDVOSBs pursuing set-aside opportunities with federal agencies, and putting the responsibility for assessing eligibility with the SBA. The timeline for implementing this, however, is uncertain. In fact, the first set of rules on this subject was introduced in 2013, and the VA's CVE is constantly changing its own processes (effort that suggests that perhaps the SBA isn't taking over any time soon).

**5. If 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; AND
- The management and daily business operations 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; AND
- It is "**small**" under the applicable NAICS codes. (Keep in mind that the VA only permits those NAICS codes where the business is "small" to be listed in its VetBiz profile).

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: 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, applicants 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's 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, specifically at 38 CFR 74.4. "Veteran-controlled" means a veteran is in charge of both the **day-to-day management** and **long-term decision-making authority**. As this definition is nuanced, applicants 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's 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. The CVE will also look into the business's dynamics to ensure that the veteran is in fact the one who is managing the day-to-day and long-term operations of the business, and that any delegation to other employees is not an abdication of these management responsibilities. Ultimately, the veteran must have ultimate authority over the inter-workings of the business.

## **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:

- 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. The key is to showing that at least one veteran owner is full-time during "normal working hours" of "a business of its nature." This allows flexibility; if it does not matter if the veteran works during "office hours," he can provide an explanation providing how he remains available during daytime hours and

invests significant time during the evening and weekend hours.

- Delegating Authority – If a veteran delegates “management” tasks, this might impede his 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 or has responsibilities that reflect control over important managerial functions.
- 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 and how, **based on the individual facts**, the veteran controls his business. *See KWV, Inc. v. U.S.*, 12-882C (2013).

#### **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 is given. 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 registered in the D&B database (ie, have a D-U-N-S number), and in the SAM.gov database. A business must 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?**

An applicant 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, the business 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. Access the list of required documents by business type at: <https://www.vip.vetbiz.gov/Public/Register/DocumentList.aspx>.

Also keep in mind that the CVE requests documents that are not on the list, as it may request any documents it finds necessary for purposes of assessing eligibility. For example, the CVE might ask for a DD-214 (if it can't find the veteran's information in BIRLS), Certificates of Good Standing (if it can't verify good standing on the state's website), a DBA certificate, and 1099 tax information.

Further, be aware that there is no recourse for someone who is uncomfortable with providing certain information to the CVE. Some veterans have successfully redacted 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 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. Access the briefs at: <http://www.va.gov/osdbu/verification/assistance/briefs.asp>, but please exercise caution when using them, as some are too general to be helpful. Also, some have been identified to contain poor phrasing and even mis-quoted or incorrect law.
- 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 tool at: [http://gcctech.fluidsurveys.com/s/Verification\\_Self\\_Assessment\\_Tool/](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 general questions, and help them address issues in their application. **They will not draft anything for applicants, to include Letters of Explanation or corporate documents.** These individuals are all with local Procurement Technical Assistance Centers (PTACs). Access the listing of counselors by state at: <http://www.va.gov/osdbu/verification/assistance/counselors.asp>.
- An experienced attorney or consultant, who can draft corporate documents and Letters of Explanation (LOE) and act as a representative.
- LinkedIn, public forums, and vet groups. Many businesses have gone through the

process and have 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. Always take any such advice with a grain of salt.

### **What do the VetBiz Stages Entail?**

## **1. What is the o877 form and how to I fill it out?**

The VA's o877 form is electronically signed by all of the applicant firm's owners at the beginning of the verification process. No one is excluded, even if the percentage of ownership is negligible. This form is the owners' certification that all information provided is truthful and that they believe the firm is eligible for verification.

One rule of thumb when signing the o877 is ***the name for any veteran must match perfectly with the DD214***. The CVE will check the information provided on the o877 with the VA's BIRLS information system to ensure that the veteran is eligible to have his business verified. Also, if there are any issues you need to correct on the o877, you can't do this online. You'll have to call the help desk to effect the change.

## **2. What's this I hear about trouble with selecting NAICS codes?**

When a business applies for verification, on its profile it will choose its applicable NAICS codes. Because the VetBiz system needs upgrading, some of the NAICS codes that are listed are now out of date. If you have chosen one of those NAICS codes (or if it is left over from your last verification, and you don't update it during the reverification process), you will have to go through the pre-determination process at the end of verification by fixing your NAICS codes. Pre-determination is the process where a business has the chance to fix "easily correctable" issues rather than get booted.

To avoid this issue, use NAICS codes from the SBA's current size standards. Access it at: [https://www.sba.gov/sites/default/files/files/Size\\_Standards\\_Table\\_2017.pdf](https://www.sba.gov/sites/default/files/files/Size_Standards_Table_2017.pdf).

Also note that you may only list those NAICS codes where your business is "small."

## **3. What are the formal stages of the verification process, and what do they entail?**

There used to be four (formal) different stages of verification: initiation, examination, evaluation, and determination. Now, however, the CVE has implemented a process where, after a business is submitted for verification, it is assigned to an intake analyst who will review the documentation and determine what additional information is needed to make the application "complete." Information will be requested via document requests (where the applicant will upload the documentation to the VetBiz portal). The applicant must also submit a Business License Declaration, which attests to having fulfilled the business licenses requirements applicable to that particular business.

Then, the application goes to an examiner/case analyst that will ask questions and request more documents bearing on eligibility. This is done for purposes of assessing veteran ownership and control. That individual will make a recommendation as to approval/denial before sending the application to the Federal Review team, which will

quality control check the review and issue a final determination. Once the application reaches Federal Review, there is nothing more for the business to do other than check its email for its approval letter or directions regarding participating in the Post-Review Findings program (discussed below).

#### **4. 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 intake and examination stages, and this isn't an indication that anything is wrong. In the intake stage, the CVE will examine your application for thoroughness and ask for anything that is missing. In the examination stage, where the CVE audits for veteran and ownership and control, it 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). When the CVE is waiting on you for documentation, their clock stops, so responding quickly will/should quicken the process. However, if you need additional time to respond to a document request, the CVE is generally good about granting extensions.

#### **5. How long will I wait for a verification determination?**

As of June 2018, the CVE's processing times for both verifications and reverifications are taking upwards of 90 days, in large part because the CVE is constantly changing its processes and with that comes learning curves of its examiners and other delays. (When the CVE utilized its four-stage process, it was faster). This 90-day quote also only applies to flat-out approvals; if you run into an issue and have to participate in the Post-Review Findings Program, that will take even longer.

**Also, keep in mind that the clock only starts running once the intake analyst determines that you have submitted a "complete" application.** This might be a couple of weeks after a business first hits "submit," or even a month.

Other 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.

#### **6. What are my chances for a successful verification?**

The VA used to claim that it had a 97% approval rate, conveniently not mentioning in its posted statistics that this approval rate did not include businesses that withdrew their applications. Withdrawals can be done at any stage of the process, including when the business realizes it won't be able to provide a mandatory document, that it can't meet the eligibility criteria, and at the end of the line when the VA informs the business that it has found to be ineligible and gives it the opportunity to withdraw (which is, in effect, a

denial, though this fortunately no longer comes with the six-month wait period that used to apply).

One important point to keep in mind, however, is that your approval chances depend on your individual circumstances. If your business is a one-man band and you have no outside employment, your process will be smoother than a three-man venture where the veteran works full-time elsewhere.

## **7. What is the Post-Review Findings program?**

The Post-Review Findings program replaced the earlier Pre-Determination and Pre-Approval program. This program is the process by which the VA provides options for businesses that are not outright given an Approval determination. In these cases, the VA has identified eligibility issues that preclude eligibility. These may be drafting issues in the business's corporate documents, or there might be an eligibility issue that was not adequately addressed during the verification process. In that instance, the CVE will provide the business with two business days to do one of three things: 1) withdraw its application; 2) accept the determination as is (i.e., a denial); or 3) participate in the Post-Review Findings program.

If the business elects to participate in the Post-Review Findings program, it will then have five business days to correct the eligibility issues, which may include amending its operating agreement or bylaws as well as providing a more robust explanation to address identified eligibility issues (which should have already been addressed, to some degree, during the eligibility process). From there, the business will either receive an Approval determination, or it will be required to withdraw because it was unable to successfully overcome all eligibility issues.

## **8. 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 Post-Review Findings program. Unless a veteran fails to check his email and the deadline to respond or withdraw passes (or unless the veteran becomes fed up with the process and simply gives up), a denial is very rare.

If you fail to check your email/a letter goes to spam, it is worth calling the CVE to see if they are willing to accommodate you (ie, let you participate in Post-Review Findings program even if you missed the deadline). They may do so given that a denial counts against their approval statistics.

## **Legal Meets Practical's Best Practical Tips for Getting Verified**

### **1. Assess your situation.**

There are a number of basic eligibility problems that pose 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 have issues with obtaining verified status. 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 if yours is a multi-owner business.***

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 Post-Review Findings program (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 asks two dozen questions and for two dozen documents. 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 Post-Review Findings program because you didn’t explain yourself well enough.

Last, keep in mind that the CVE does not assess capability of success. It is only looking to determine whether a business is “veteran-owned” and “veteran-controlled” under its definitions. As such, you don’t need to submit information that bears on capabilities.

### **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: “A franchise agreement has not been uploaded to the VetBiz portal because our business does not have one. It is not a franchise and therefore such document is unnecessary/does not exist.”). Others require much more detail and thought 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 again; and you’ll find yourself either on the phone with the CVE or re-uploading a document. **Also, when you upload documents, use Word or PDF format.** According to the CVE, these are the easiest for it to view.

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

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 intake 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 may be administratively withdrawn. Also, for every extra day you spend pulling together information to comply with a document request, that's an extra day added to your processing time.

### **9. Put important dates on your calendar.**

This mainly has to do with reverification. Six months 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 since you've last hit "submit" 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 (where 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 their 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 (for instance, if the veteran majority owner takes a new job where he no longer devotes much time to the verified business, or if he sells off enough interest that he no longer holds 51% ownership).

### **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 logging into your VetBiz portal, clicking on “Change Request,” and following the instructions. If you are in doubt as to whether you need to report the change, do it anyway. If the CVE has a problem with the change and/or wants more information, they can then contact you. And if they don’t, then, and then later raise issue, you can point to the Change Request as evidence that you’ve done your due diligence.

### **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.

Also, in the event you are awarded a VA set-aside contract after the change, but before your eligibility is confirmed by the CVE, you risk losing a contract in the event of a protest. This is because under 38 C.F.R. 74.3(e)(4), the CVE must verify that all eligibility requirements have been met despite a change in ownership or business structure. (Accordingly, this raises a unique situation – your “verification” period will not have expired but you won’t be eligible for new contracts until the CVE validates the change). In other words, if you are actively pursuing VA work, report changes immediately!

## **Reverification**

### **1. How long does verification last?**

Verification is good for three 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 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 rather than three years being added to your expiration date (ie, you technically “lose” that time).

### **3. 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.

### **4. 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.”

### **5. 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 examination and is put in the same queue as the initial 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 three-year verification period. This might happen because a size protest revealed an eligibility problem, because a veteran died or abandoned the company (and the CVE finds out about it), an audit dug up some “dirt” (or where the business simply failed to provide requested information), or because some other event suggested that a business was ineligible for the Veterans First Contracting Program (and further inquiry confirmed ineligibility).

### **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.

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) to cancel the participant's verified status. The CVE will issue a Notice of Verified Status Cancellation, which sets forth the specific facts and reasons for the decision. The Notice 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 its VetBiz Registry listing removed. It 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. It is unclear how successful these appeals are; it might be more productive to reapply and assume you'll be un-verified for a few months.

### **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.

## VetBiz Audits

### **1. When may the CVE audit a VetBiz-verified business?**

Verified businesses may be audited following 90 days of the last verification. The CVE will not audit within 90 days of the end of a verification period. In general, the CVE has the right to audit any business within the VetBiz registry, regardless of business structure or whether it is performing VA contracts.

### **2. Why will the CVE audit? (ie, should you panic?)**

As long as you are a legitimate VOSB or SDVOSB, you shouldn't panic. If you're non-conventional (such as if you are a veteran with two companies in VetBiz), just know that it might raise an eyebrow, and the CVE might flag you as "high risk" when it verifies you and make a note to check in on you later.

More commonly, the VA will audit if a business is performing VA set-aside contracts. The VA can only audit so many businesses, so it invests its time and resources in those businesses that are utilizing and benefiting from the Veterans First Contracting Program. If you hold a VA contract, expect to get audited, and make sure you still meet the eligibility criteria. This includes promptly reporting changes.

### **3. What is the audit process?**

The audit process is fairly simple. The CVE will send an auditor to your place of business. He will ask you questions about your business, its operation; and he will also ask for a number of documents that would be submitted in a re-verification application. (He most likely won't ask for every single document on the Required Documents List). If the auditor shows up at your business and no one is there (for example, if it is a home-based business and you're running errands at the time), he will try to get in touch with you.

Almost always, the business will not have all of the documents necessary to conduct the audit. If this is the case, the auditor (called an "on-site examiner") will send a follow-up email asking that certain documents be uploaded to the VetBiz portal. Sometimes the auditor will open up certain sections of the portal to upload the documents; and sometimes all of the sections will be accessible. Clearly label the documents; and when you can, place them in the appropriate section.

### **4. Can I prepare?**

Actually, yes. When the examiner shows up, have every document ready that you would need if you were going through re-verification that very day. This effectively means to keep a file folder on your computer labeled "VetBiz Audit" with your current documentation. If that's too tedious – which it may be – just make sure the information

is readily on-hand so it can be pulled for the examiner when he's there.

### **5. What happens if I don't provide documentation in time?**

An auditor will not give you much time to provide documentation, generally only a few days. If you fail to meet the deadline, the CVE will issue you a Notice of Proposed Cancellation that effectively states that you failed to comply and gives you one last chance to provide the required documents. If you provide the documents at that time, you're in compliance; however, if you fail to do so, the CVE will issue you a Notice of Verified Status cancellation.

Long story short, you'll have some time to "cure," but don't put yourself in that position.

### **6. What happens if the CVE finds eligibility issues during an audit?**

This is similar to what happens during the verification process. If an eligibility issue is uncovered, the auditor will ask additional questions. If these questions are not answered satisfactorily, the CVE may initiate Cancellation Procedures (See Page 20).

### **7. Will the three-year period start over upon successful audit completion?**

No. An audit is not a "full" examination for eligibility, so the verification period will not start over upon the successful completion of an audit.

## **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 with corporate documents occur when a non-veteran is in the mix; 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. While 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, they do not define "full-time." However, the CVE's (fairly recent) policy is that the veteran must work at least 15 "active" hours with the business. In other words, 15 hours a week, the veteran must be performing actual work for the business (compared to merely being available in the event a need arises). 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 this "full-time" basis. A Letter of Explanation addressing this should address the days of the week and hours spent at the applicant concern and an explanation for why the outside employment doesn't interfere with responsibilities to the applicant concern.

Also, the Letter of Explanation must often justify why working odd hours is "normal" for a business of that nature (assuming the veteran is engaged elsewhere during "regular" office hours). For instance, if the business is a construction company and the veteran spends his days at another job, the Letter of Explanation could detail how it is "normal" for a startup construction company to have only afternoon/evening and weekend hours, as this is the timeframe during which clients are available for appointments and for services to be performed.

**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/or 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**

The CVE will scrutinize whether a non-veteran's involvement hurts a veteran's ability to control his business. 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 adequately explains 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**

While the CVE is rumored to be soon doing away with applying community property rules, 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 in one of these, community property rules currently apply.

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 ownership to provide that the veteran owner has 51% ownership, or that the business pre-dates the marriage. 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).

With as minimal legalese as possible, this means that in order to pass muster with the CVE, trusts must meet the following requirements:

- The trust must be revocable (It can be undone.).
- The veteran must be: 1) the grantor, 2) a trustee, 3) 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, CVE regulations do not define “caregiver” or how this individual is designated as such. The regulation **currently** provides (as it is in the process of being amended) 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. “Psuedo” 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 and Control

In general, 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 exercise leverage over the applicant or participant, 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 franchise.

The CVE has separate regulations for control (38 CFR §74.4) and affiliation (38 CFR §74.5). However, the CVE's regulations state that a non-veteran cannot "exercise actual control or have the power to control [an applicant]" (38 CFR §74.4(g)(1)), which is similar to the SBA's definition of "affiliation" (See 13 CFR §121.103(a)). This would seem to suggest that a finding of affiliation would render a business ineligible for not meeting the "control" requirement. In practice, this doesn't seem to be the case, but be careful—businesses have lost size protests before the SBA on the basis of affiliation despite having been found to be eligible "SDOVBS" by the CVE. (See *Size Appeals of G&C Fab-Con, LLC*, SBA No. SIZ-5649 (2015)).

There are also exceptions to affiliation, such as if two businesses are in a joint venture or share a mentor-protégé relationship under the SBA's All Small Mentor Protégé Program.

## 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 must go through the VetBiz process all over again. You will form the joint venture, 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 outlines the requirements a joint venture must meet to be eligible for the VetBiz registry. These are as follows:

- 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
- Every SDVOSB joint venture agreement must contain a provision stating that the SDVOSB must receive profits from the joint venture commensurate with the work performed by the SDVOSB. (\*Note – the Joint Venture Brief on the VA's website is WRONG, failing to reflect SBA changes in effect since 2016).
- 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 my blog at: <http://www.legalmeetspractical.com>. Also, contact me with any questions about VetBiz verification at: (703) 552-3220 or via email at [scs@legalmeetspractical.com](mailto:scs@legalmeetspractical.com).