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IN THIS ISSUE

Diane Hastings Lewis and Steve Ruprecht report on Federal Service-Disabled Veterans Set-Aside programs, requirements, eligibility and appeals.

Federal Service-Disabled Veterans Set-Aside Program

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Federal, state, and local governments have long used preference programs in public procurement. The programs are particularly visible in the construction industry. Preferences for small businesses, minority-owned businesses, and women-owned businesses have been around for many years, however the newest procurement preference—the service-disabled veteran-owned small business—is not nearly as widely known or understood.

Enacted in 2003, the Veterans Benefit Act of 2003¹, creates a preference for small businesses owned and controlled by service-disabled veterans. The preference creates set-asides for service-disabled veteran-owned small business concerns (“SDVO SBC’s”), and sets a goal to annually award at least 3% of federal agency procurement dollars to SDVO SBC’s.² The specific procedures for the SDVO SBC set-asides are set out in Federal Acquisition Regulations.³ As governments look to meet the 3% procurement guideline and a greater number of businesses are claiming SDVO SBC status, more and more attorneys and sureties are finding themselves fielding questions regarding a small business’s eligibility and handling the appeals process if a business is deemed not to qualify. Therefore it is important to know the requirements for SDVO SBC eligibility as well as the protest and appellate process.

I. Ownership and Control Requirements

There are strict eligibility requirements that a business must meet to qualify as a SDVO SBC, which are set forth by the Small Business Association (“SBA”) in the

Regulations.⁴ Section 125.8 of 13 C.F.R. provides the definition of service-disabled veteran. The two main requirements are that the business must be both owned by service-disabled veterans, and controlled by service-disabled veterans.⁵ The majority of challenges to a SDVO SBC’s status revolves around whether the business meets the owned-and-controlled requirements of 13 C.F.R. §§ 125.9-.10. The ownership requirement mandates that a SDVO SBC be “at least 51% unconditionally and directly owned by one or more service-disabled veterans.” Ownership must be direct, and the 51% requirement applies regardless of whether the business is a partnership, limited liability company, or corporation. Significantly, even if a service-disabled veteran owns a majority of the company, the company may be found to not be owned and controlled by a service-disabled veteran if control is limited by supermajority voting requirements.⁶ The power to control the business must be exclusive and cannot be shared or ambiguous.⁷

To comply with the “control” requirement, the “management and daily business operations of the concern must be controlled by one or more service-disabled veterans.”⁸ More specifically, both long-term decision making and day-to-day management and administration of the business must be carried out by service-disabled veterans. In addition, a service-disabled veteran must hold the highest officer position in the business, such as President or Chief

¹ Pub. L. No. 108-183, 117 Stat. 2651, 2662 (2003), 15 U.S.C. § 657f (Supp. V 2005).

² 15 U.S.C. § 644(g).

³ Subparts 19.2-19.8 and 19.14.

⁴ 13 C.F.R. §§ 125.8-.13.

⁵ 13 C.F.R. §§ 125.9-.10.

⁶ See *Matter of Firewatch Contracting of Florida, LLC*, SBA No. VET-137 (2008).

⁷ *Matter of Piedmont Contracting & Design, Inc.*, SBA No. VET-168 (2009).

⁸ 13 C.F.R. § 125.10(a).

Executive Officer, and must have managerial experience necessary to run the business.

In analyzing whether a service-disabled veteran “controls” the company, the SBA and, if appealed, the Office of Hearings and Appeals (OHA), will scrutinize the service-disabled veteran’s duties, position, and experience; and may compare his or her role within the company to that of others. For example, in *Matter of KDV, Inc.*,⁹ the service-disabled veteran who owned 51% of the company and served as its president only had experience as a hair stylist and as an automobile dealership service manager. In contrast, the service-disabled veteran’s business partners had a combined total of over 50 years of experience in general contracting and commercial and industrial construction. Additionally, the claimed SDVO SBC operated out of the same location and utilized the same support resources as a larger company owned entirely by the experienced contractor who owned 49% of the claimed SDVO SBC. Noting that the company was bidding on multi-million dollar boiler replacement contracts, the SBA rejected the company’s claim that a former hair stylist and automotive service manager was going to run the daily operations of the company. The OHA likewise affirmed the SBA’s decision on appeal.¹⁰

Factors the SBA have considered when evaluating whether a business claiming SDVO SBC status is truly controlled by a service-disabled veteran include: the service disabled-veteran’s ability to sign contracts binding the company, the power to sign labor agreements on behalf of the company, the authority to withdraw funds from the company’s bank accounts without additional approval, and whether written consent of

other members is required to take actions on the company’s behalf.¹¹ Even if the service-disabled veteran holds the highest officer position of the company and possesses the necessary experience to run the business, if the service-disabled veteran needs additional consent before taking action on behalf of the company, the company will not be deemed to be a qualified SDVO SBC.¹²

II. Protest of SDVO SBC Eligibility

Government Contracting Officers who accept bids for government projects are the front line for determining whether a business qualifies as a SDVO SBC. If a Contracting Officer—or competing business—questions a business’s SDVO SBC eligibility, there are specific procedures to challenge the SDVO SBC’s status, which are set forth in 13 C.F.R. §§ 124.24-.28. However, an individual’s status as a service-disabled veteran can only be protested for sole source procurements.¹³ A protest must be in writing and must specify all grounds on which the protest is based. The protest may be dismissed for lack of specificity or for lack of evidence in support of the claims.¹⁴ All protests must be submitted on or before the fifth business day after notification of the successful contractor, or the fifth day after bid opening.

If the protest is submitted by an interested party, it must be delivered to the Contracting Officer. A Contracting Officer must submit their written protest—and any protest received by an interested party—directly to the Director in the Office of Government

⁹ SBA No. VET-189 (2010).

¹⁰ *Id.*

¹¹ See, e.g. *Matter of VetIndy, LLC*, SBA No. VET-175 (2010).

¹² *Matter of Eagle Integrated Services, LLC*, SBA No. VET-172 (2009).

¹³ 13 C.F.R. § 125.24.

¹⁴ See *Matter of SDV Solutions, Inc.*, SBA No. VET-176 (2010).

Contracting. The Contracting Officer must also forward all timely protests to the SBA. The SBA makes a determination as to the SDVO SBC status of the protested business within 15 business days of receiving the protest and will notify the Contracting Officer, the protester, and the protested business of its decision in writing.

III. Appeal of SBA Determination

The procedure for appealing an SDVO SBC protest determination is laid out in 13 C.F.R. § 134.501-.515. An appeal must be taken within 10 business days after the SBA determination and is made to the Office of Hearings and Appeals (“OHA”), which will select a Judge to preside over the appeal. The appeal petition must be in writing and must include: (1) contact information of the Contracting Officer; (2) a statement that the petition is appealing an SDVO SBC protest determination and the date the appellant received the SDVO SBC protest determination; (3) a full and specific statement as to why the SDVO SBC protest determination is alleged to be based on a clear error of fact or law, together with an argument supporting such allegation; and (4) the contact information and signature of the appellant or its attorney.¹⁵ SDVO SBC protest determination appeals must be filed with the OHA and served in accordance with 13 C.F.R. § 134.204.

An appeal of a SDVO SBC is reviewed for whether the determination was based on “clear error of fact or law.” The OHA will not review determinations made regarding an individual’s status as a veteran, service-disabled veteran, or veteran with a permanent and severe disability.¹⁶ An opposing party may file a response to an appeal within 7

business days after service of the petition, however discovery is not permitted and oral arguments will not be held.¹⁷ Again, a determination will be made within 15 business days after the expiration of time to file a response. Such determination is the final agency determination and is binding on the parties. A request for reconsideration may be filed, however the request must clearly show an error of fact or law material to the decision.¹⁸ Nonetheless, even if a company’s SDVO SBC status is rejected, the company can submit offers on future SDVO SBC procurements if it fixes the impediment to eligibility.¹⁹

During the pendency of the protest and until 15 days after the date any response to the petition was due, the award of the contract by the Contracting Officer is stayed, unless the Contracting Officer determines in writing that an award must be made to protect the public interest.²⁰ Given the short timeframes in which protests and appeals can be filed, and the time after which a Contracting Officer can award the contract, it is important to closely monitor deadlines. Nonetheless, a contract awarded after the deadline but before a determination is issued may be void or voidable.²¹

A word to the wise: 13 C.F.R. 125.29 provides penalties for “knowingly” misrepresenting SDVO status relative to a procurement program. The arsenal includes suspension or debarment, civil penalties under the False Claims Act, and criminal penalties as well.

¹⁵ 13 C.F.R. § 134.505.

¹⁶ 13 C.F.R. § 134.508.

¹⁷ 13 C.F.R. § 134.511.

¹⁸ 13 C.F.R. § 134.515.

¹⁹ *Matter of Hamilton Pacific Chamberlain, LLC*, SBA No. VET-201 (2010).

²⁰ 13 C.F.R. §§ 125.27, 134.504

²¹ *Matter of Nelco Diversified, Inc.*, SBA No. VET-140 (2008).