



FIRST CALL

www.nvsbc.org

THE SUMMER MID-POINT

A message from NVSBC Executive Director, Scott Denniston



On behalf of myself and the entire NVSBC Board of Directors, we hope you are having a happy, restful and joyful summer! Take time to enjoy the fruits of your labors with family and loved ones.

THANK YOU to all who attended VETS 16 last month in Norfolk, VA. The Board and organizers believe we have the best small business conference in the country because of YOU, the participants. The workshops, speakers, match-making, and exhibit hall are great; but what makes VETS special is the comradery and veterans helping veterans, which gets better every year. We are excited about our new “mentoring/coaching” program which will continue the “veterans helping veterans” momentum started at VETS 16. *We also want to thank Ed Jessen of OBX Teck and all who donated so generously to the NVSBC Scholarship Fund - monies we will use to invite new*

veteran small business owners to come to VETS 17 and beyond. We are working on scholarship criteria, and please start thinking of deserving start-up veteran business owners.

We are carefully watching as the VA implements VETS First after the Supreme Court’s decision in *Kingdomware*. Last month, I asked for examples where VA is not, in your opinion, implementing VETS First as we expect. We shared with you via email and www.nvsbc.org VA’s guidance to its field operation. The VA intends to issue further guidance soon. We are hearing of instances where members believe VA is not implementing VETS First properly and are developing specific examples. We need your input to hold VA accountable, so email me at scott.denniston@nvsbc.org when you see non-compliance with VETS First. Thank you and take care!

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NVSBC’s purpose is to transition veterans into business owners servicing the federal government.

Check Out Our Website!

Is your VA VetBiz verification expiring in the next 120 days? You might want to get a move on beginning the reverification process - *the VetBiz system will be down from August 11th through August 22nd*, meaning that no applications can be processed or submitted during this time period.

Kingdomware Decision May Prompt Real Change



As many of our members know, on June 16, the United States Supreme Court (SCOTUS), by a **unanimous vote**, ended the four-year long battle of *Kingdomware Technologies, Inc.* The VA has expressed that it will comply with the decision.

In essence, SCOTUS held that under the Veterans Benefits, Health Care, and Information Technology Act of 2006, the VA is mandated to set aside contract opportunities for VOSBs for schedule contract when the “rule of two” is met – the contracting officer has a reasonable expectation that two or more VOSBs will bid on the work, and offer a fair and reasonable price. Applying rules of statutory construction, SCOTUS sided with veteran businesses in holding that key language (“shall”) was **mandatory** in requiring the VA to honor the preference.

This should open the door for far more work for VOSBs competing for schedule contract; and we’ll see what happens in the aftermath, as

subsequent Congressional testimony on this development confirms that a number of agencies are considering whether SCOTUS’s decision has broader implications for other small business programs. Specifically, the SBA has publically expressed that SCOTUS’s reasoning may extend beyond the relatively narrow statute governing VA set-asides and require significant changes to long-standing principles established under the Small Business Act.

In other words, while *Kingdomware* technically impacts only VA contracts, what about contracts issued by other procuring agencies? After all, the VA and the SBA are supposed to have similar interests in giving work for veteran-owned firms.

Perhaps in the future, amendments to SBA regulations will effect this change across the board; conversely, maybe a Congressional amendment to the VA’s Act will eliminate the preference. Only time will tell.

A GAO Lesson: Corrective Action is Not Always a Victory

A Government Accountability Office (GAO) bid protest decision issued in late June illustrates that even when we receive corrective action in a protest, we might still end up with what we had before the effort and money invested in a protest - nothing.



In *Social Impact, Inc.*, a disappointed bidder had protested the award of a federal contract on various grounds, including organizational conflict of interest and mis-evaluation of the protestor’s technical approach (B-412655.3). The protest was later dismissed by the GAO as academic (or moot), given that the agency communicated that it would take corrective action.

Unfortunately for the protestor, the agency’s proposed corrective action was to cancel the solicitation entirely, on the basis of in-agency changes that prompted it to move some of the procurement’s related work in-house. Social Impact, Inc. protested again, invoking FAR 15.206(e) - which allows for cancellation by a CO only if an amendment “is so substantial as to exceed what prospective offerors reasonably could anticipate” - but the GAO upheld the agency’s decision. It noted that in negotiated procurements, contracting agencies have broad discretion in deciding whether to cancel a solicitation, and they are required only to establish a “reasonable” basis for doing so.

This goes to show that when one protests, corrective action doesn’t mean you’ll get what you want. Not only that, but the agency taking corrective action might not have anything to do with your protest grounds. Here, the agency’s corrective action appears to have been unrelated to the protest itself.

A GAO Lesson: Specificity is Key

This is a lesson that will aid our members not just in knowing whether it's worth it to protest a contract loss before the GAO, but in how to put together an effective technical proposal: **in describing how you will meet a solicitation's requirements, always be as specific and detailed as possible.**

In *Rocky Mountain Excavating, Inc.*, a disappointed bidder (of 24 total) protested the award of six contracts under a VA SDVOSB set-aside for construction services, arguing that the VA's evaluation of its technical proposal was unreasonable. While the protestor in general received strong ratings in this best value procurement, it was rated as "marginal" as it relates to one particular sub-factor. The protestor offered a lower price than two other contractors, but agency awarded these others the contracts because they received higher technical ratings. This is consistent with "best value," as cheaper isn't always the best deal.

In uploading the agency's decision, the GAO noted that it will not re-evaluate proposals, but merely determine whether the agency acted reasonably. Here, the protestor had not gone

into extensive detail regarding its experience under the subfactor where it was rated as "marginal," and the GAO determined that it was appropriately downgraded as a consequence.

As this protest shows, it doesn't matter how experienced or qualified a business is if this isn't clearly presented in its proposal. In responding to a solicitation, assume that the source selection team has no idea who you are or what you have to offer. This is true even if you are the incumbent. If something is not included in a proposal, the agency will treat it as if it doesn't exist.

Accordingly, don't risk facing an uphill battle in a protest. In your technical proposals, be specific, be detailed, and clearly address each solicitation requirement. Provide the source selection team with the information necessary to give you the technical rating you deserve.



VA IT SPENDING LONG-TERM PROJECTIONS

According to Deltek, a reputable provider of software and information solutions for government contractors (among others), spending by the VA on contracted IT goods and services will climb from \$4.1 billion in FY 2016 to \$4.5 billion in 2021, reflecting a 3.7% compound annual growth rate. Deltek's forecast projects flat spending on hardware, but increased spending on software, IT services, and communications and network services over the forecast period.

Under the guidance of the VA's Chief Information Officer, LaVerne Council, who took the reigns in July 2015, the VA now has a new vision and mission:

Mission - Collaborate with business partners to create the best experience for all veterans.

Vision - Become a world-class organization that provides a seamless, unified veteran experience through the delivery of state-of-the-art technology.

Deltek expects the increase to reflect the goals and objectives of the VA's mission. However, this raises a question - is a 3.7% increase over five years a leap significant enough to create enhanced opportunities for veteran business owners? Access further details on Deltek's blog [here](#).



GUILTY VERDICT IN RENT-A-VET CASE

In mid-June, a federal jury in Massachusetts found David E. Gorski guilty of conspiracy to defraud the U.S. and wire fraud. The charges stemmed around circumventing the requirements of the SBA's SDVOSB Program, and the facts show that Gorski was pretty bold in his actions.

According to the Department of Justice's press release, Gorski established a company, Legion Construction, Inc., in 2006 after recruiting a disabled veteran of the Korean War to act as the corporation's straw owner for the sole purpose of obtaining federal construction contracts under the SDVOSB Program. When the veteran's absence from the business became too conspicuous, Gorski hired a second disabled veteran to serve as the figurehead owner of Legion. Legion acquired more than \$110 million in federal contracts between 2006 and November 2010, after Gorski falsely represented to federal contracting officers that the company was owned and operated by service-disabled veterans.

In March of 2010, a different SDVOSB registered a protest against Legion, challenging its SDVOSB status. Legion utilized a large Boston law firm to defend the protest against it, during which false statements were made to the SBA.

This tactic allowed Legion to defeat the protest accusations, but Gorski began looking for loopholes in the SDVOSB Program's requirements. He siphoned money from the corporation by having one of the veteran owners "gift" him \$900,000; and he also established private bank accounts to deposit millions of

dollars for his own benefit. Before the bank accounts could be opened, however, a federal grand jury issued subpoenas to Legion and several witnesses.

Gorski faces up to five years in prison, to be followed by up to three years of supervised release and a maximum fine of \$250,000 on the count of conspiracy to defraud the U.S. On the wire fraud counts, Gorski faces up to 20 years in prison, to be followed by up to three years of supervised release and a maximum fine of \$250,000. Actual sentences for federal crimes are typically less than the maximum penalties, and Gorski's sentence will be imposed by a federal district court judge based upon the U.S. Sentencing guidelines and other statutory factors.

While this facts scenario presents a typical "rent-a-vet" in many respects, it was unique in the court's treatment of documents that were subject to attorney-client privilege. During the course of the case, judges ordered the production of Gorski's communications with Legion's counsel *and* his private counsel under the "crime-fraud exception," which permits disclosure when: a client is in the process of committing crime or fraudulent act; and the client communicated with the lawyer with the intent to further the crime or fraud.

In other words, a client's communications with his attorney aren't protected if he's actively furthering a crime or fraud. This would include any plot to pull the wool over the SBA's or contracting agency's eyes to fraudulently obtain SDBVOSB set-aside work.

FIRST CALL

The NVSBC is pleased to offer "First Call" to its members. In our active duty careers, "first call" was the notice to get up and get moving to usher in a new day. We will provide you with all the important information you need to get up and moving to success in the federal marketplace. This publication is prepared with the help of veteran advocate and attorney, Sarah Schauerte. Access her company website and blog at: <http://www.legalmeetspractical.com>.



Ideas?

If you have ideas for future content for First Call, or how to maximize the benefit NVSBC offers to its members, we always welcome input. Please contact Scott Dennison with your comments at: scott.denniston@nvsbc.org.