



FIRST CALL

www.nvsbc.org

Update from NVSBC

A message from NVSBC Executive Director, Scott Denniston



I am sitting here on Veterans Day of 2017, thinking how blessed I am to not only be living in the United States, but to have the honor and privilege of working with and for America’s finest, our veterans. On behalf of the entire Board and the NVSBC team, THANK YOU for your service!

Last weekend one of the grandkids called and asked if I had a picture of me in uniform. How many of us while in service bought good cameras and stereos at the PX? I did find a picture and it made me realize how many years have passed and how many friends I’ve lost. I hope you all take time every day to remember those we’ve lost and how blessed we are to live where we live and to make a real difference in this world!

In last month’s article I told you about the Congressional Roundtable in which NVSBC was invited to participate. During the roundtable, Congressman Bergman, Chairman of the Subcommittee on Oversight and Investigations, asked groups to provide written

recommendations to the committee. On October 17th we submitted eight specific recommendations for consideration. (You can see these recommendations at www.nvsbc.org). To date, NVSBC is the ONLY organization to provide formal comments, which we understand the American Legion plans to endorse.

It appears the roundtable generated interest from members, but to date no action. This means we need to keep the pressure on!!! Since the roundtable, we’ve learned that VA plans to eliminate SDVOSBs/VOSBs from Medical/ Surgical Prime Vendor, award contracts to large businesses under T-4NG without proper market research, establish a non-FAR based procurement program for prosthetics, and use Amazon for all micro-purchases. These tactics to avoid VETS First get more creative all the time.

You all have a stake in stopping this and need to engage your Congressional representatives!!

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

WHAT HAVE YOU DONE THIS YEAR?

NVSBC is committed to recognizing the accomplishments of its members! If you would like an individual or firm accomplishment (including, but not limited to: a contract win, award, certification, or other recognition) to be featured in next month’s issue of First Call, please email Sarah Schauerte **by December 13th** at scs@legalmeetspractical with pertinent details.

The \$350 GAO Protest Fee: It's Happening!

Back in April of 2016, the GAO issued a proposed rule asking if it was a good idea to start charging \$350 to file bid protests. Now, after a year and a half of radio silence on the issue, it appears the agency is moving forward.

Ralph White, the managing associate general counsel for procurement law for GAO, has confirmed that the agency is developing a new electronic protest docket system and will charge the filing fee to help offset the cost of its development, operations and maintenance. According to this reliable source, the system will be implemented in two phases: a *pilot phase*, where the GAO will migrate several existing protests to the system and require the parties in those cases to use the system (with no fee assessed); and a *second phase*, where the GAO will fully implement the electronic protest docket system and all protestors pay the \$350 fee. *This second phase will begin in March.*

According to Mr. White, the GAO received several comments regarding the proposed filing fee. Supporters stated that it would discourage or reduce the number of frivolous protests, while detractors were concerned that the filing fee would discourage small businesses from filing protests. However, the “GAO determined that a uniform fee for all protests that was limited to offsetting the costs of the system was appropriate.”

The Proposed Rule did not contain provisions for protestors being reimbursed their protest fees in the event of corrective action or a sustained protest. Accordingly, in the event a federal agency makes a mistake in the federal procurement arena, contractors will (literally) have to pay for that mistake. Perhaps the filing fee will come with exceptions or procedures for reimbursement by the time it rolls out in March, but for now this doesn't appear likely given Mr. White's reference to a “uniform”

fee to maintain the system.

Also, there may be an update on the filing fee, or the reasons for that amount specifically. \$350 is more than it costs to file a formal protest in most forums; and at this time, and GAO has provided no substantiation to support that this amount is necessary. Stay tuned!



NVSBC D.C. Chapter Update

The D.C. Metro Chapter's November dinner meeting featured Mr. Tom Leney, Executive Director, Small and Veteran Business Programs, Office of Small & Disadvantaged Business Utilization, VA. Tom provided a look “behind closed doors” on issues and policies that impact the livelihoods of every veteran entrepreneur. These include:

- **VECTOR** – Only Tier 1 teams are likely to receive awards; primes must certify as small at time of each task order award throughout the life of the contract; there will be onramps in VECTOR's future
- **CVE** – VOSBs are the only socio-economic category that remains unregulated because almost all agencies allow ‘self-certified’ firms; this resulted in AT LEAST 154 ineligible firms (self-certified firms that upon review found not eligible) receiving at least \$266,627,619 in contract awards in 2016 alone. There are over 32,000 ‘self-certified’ firms vs 12,000 CVE-certified firms.
- **NVSBE 2017** – if you want to grow your VOSB/SDVOSB business, be in St. Louis 5-7 December for the VA's National Veteran Small Business Engagement. Info & registration information is available here: <https://nvsbe.com>



Katie Bilek, Vice Presidents of the D.C. Metro Chapter Match Making program, provided updates on the latest matches made with large primes and the schedule for upcoming MM activities (more information available at govmates.com). Also, Judy Bradt, VP Training & Education, presented the schedule of Boot Camp training programs for this season. Boot Camps are offered each month at 4-5:30PM prior to the monthly dinner meetings.

To take advantage of our opportunities, join us the second Wednesday of next month!

SUPREME COURT WON'T HEAR CONSTITUTIONAL CHALLENGE TO 8(A) PROGRAM

The U.S. Supreme Court's decision to deny certiorari to a constitutional challenge to the SBA's 8(a) Business Development program finally puts that long-standing issue to rest.

The *Rothe Development* case has been making its way through the federal court system since 2015, when the firm first filed its case in district court, alleging that it "cannot participate in and has no desire to participate in the section 8(a) program." Rather, it objected to the program because the "statute contains an unconstitutional racial classification that prevents Rothe from competing for Department of Defense contracts on an equal footing with minority-owned businesses."

When it comes to constitutional challenges based on classifications, a court applies a different level of scrutiny depending on the type of classification. For example, if a statute classifies and treats people

differently based on *gender*, the standard is "intermediate scrutiny." For *race*, it's "strict scrutiny." (Some of these issues and standards were addressed in cases that challenged college's affirmative action programs). For everything else, it's the low "rational review" standard, which the courts applied here because the Small Business Act on its face does not classify individuals by race. This was the only statute Rothe challenged, compared with the implementing regulations of the 8(a) program, which do contain racial classifications. Had Rothe challenged based on the 8(a)'s implementing regulations, the SBA would have been evaluated based on "strict scrutiny."

As it was, the U.S. Court of Appeals noted that the case was not even a close call in finding that there was a rational basis for the Small Business Act, affirming the decision of a district court. And when Rothe appealed to the Supreme Court, the denial of the *writ of certiorari* ends the matter.

THERE'S A NEW WAY TO APPLY FOR 8(A) CERTIFICATION!

On November 15th, the SBA is launched an enhanced application experience for firms applying to the 8(a) Business Development program.

This means that 8(a) applicants will begin the application process at Certify.SBA.Gov and not in the now-outdated General Login System. The streamlined 8(a) application process that was launched on November 15, 2017 in Certify.SBA.Gov incorporates many of the former forms into online questionnaires, although some forms must be completed and uploaded to the site.

This new system sounds like a vast improvement, but let's see how it plays out in practice! Access user guides, videos, and an application checklist here.

RULE STRIPS WORKER PROTECTIONS

Federal contractors will not face requirements aimed at protecting employees from wage theft and unsafe working conditions under a rule that confirms prior federal court rulings blocking their implementation.

The [rule](#) follows a resolution Republican lawmakers passed and President Trump signed in March under the Congressional Review Act, which voided an Obama administration push for more transparent compliance with workplace laws for employees working on federal contracts. This final rule will amend the Federal Acquisition Regulation to implement a public law that disapproved the final rule, Fair Pay and Safe Workplaces (FAR Case 2014-025) and an Executive Order dated March 27, 2017 that rescinded the prior Executive Orders authorizing that rule.

While most of the provisions of the Fair Pay and Safe Workplaces initiative were never enforced after a federal court blocked their implementation, one key reform may have made its way into some contracts: "paycheck transparency," which was intended to protect against wage theft by requiring contractors to provide detailed statements on their hours worked and compensation earned. That provision was never enjoined in court, meaning some federal contracts signed in 2017 with an estimated value of more than \$500,000 may have already included the requirement.



BID PROTEST LESSONS: TIMING IS EVERYTHING

As always, we can learn lessons from bid protests. We can also cringe at some of these, because we could easily be in their shoes. As federal contractors, we are held to high standards both in performing and bidding on agency contracts, and these cases certainly illustrate that point:

One of these cases involves the dreaded “late bid” issue. In *ManTech Advanced Systems International, Inc.*, B-414985 (Oct. 20, 2017), ManTech submitted its proposal, with a delivery receipt, before the time bids were due. It received confirmation through its Microsoft Outlook delivery receipt feature. Immediately after sending, it did the responsible follow-up act of calling the agency to ensure receipt. After speaking with the relevant point of contact, it resent the proposal to the designated inbox, the individual it had spoken to, and the contract specialist. It was again not received; and the agency ultimately told ManTech to stop trying because the deadline had passed. ManTech filed a protest with the GAO, but as the GAO almost always finds, late is late and it is ultimately “an offeror’s responsibility to deliver its proposal to the proper place at the proper time.”

Brutal, isn’t it? ManTech had put in all the work with crafting its proposal and got unlucky with transmission. What’s a few minutes? Still, the GAO never lets someone slide by with a late proposal.

The point here is to be very cautious with proposal submissions. It can be hard with a tight deadline, but give yourself

some wiggle room for a disaster (i.e., an error in transmission). Also, we’re finding that more and more federal agencies can’t accept more than 5MB in their servers, and also that Microsoft Outlook shows a different file size versus other types of servers. Be aware!

Another case addresses the timing of a bid protest. As a very high-level review, a *post-award* bid protest generally challenges an issue with the agency’s evaluation, such as how it rated an awardee’s technical proposal versus a protestor, or the exclusion of a contractor from the competitive range. A *pre-award* protest challenges the solicitation or procurement process itself. It might cover ambiguous solicitation terms, an impermissible provision, or the failure to set-aside an opportunity for SDVOSBs, as required (anyone familiar with that one)?

In this case, the DLA had issued an RFQ for headrest pad assemblies associated with aircraft ejection seats. There was one approved source for the headrest; however, the protestor had proposed an alternate source and then protested when its bid was rejected. Among other findings, the GAO found that since the requirement to use a specific source was clear in the RFQ, the protestor had notice of its objection based on the solicitation and should have filed a bid protest prior to the closing date for bids. *W.K. Engineering, Int’l., Inc.*, B-414932 (Oct. 13, 2017).

The lesson here is to know when to file. If you have a problem before bids are due, it’s likely to be an issue you need to raise sooner rather than later.

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 Denniston with your comments at: scott.denniston@nvsbc.org.