



# FIRST CALL

[www.nvsbc.org](http://www.nvsbc.org)

## Update from NVSBC

*A message from NVSBC Executive Director, Scott Denniston*



Almost “Happy New Year” to those of us in the federal contracting community. It has been a crazy year, but hopefully you all have come through the crunch successfully and are looking forward to a prosperous 2018.

On September 9<sup>th</sup>, the NVSBC published in *The Hill* (a D.C.-based political journal and website) an article titled “The VA Must Do Its Duty to Help Veteran-Owned Small Business”. The article discusses VETS First and VA’s continued efforts to circumvent its provisions following the U.S. Supreme Court decision in *Kingdomware*. The article is posted on our website at [www.nvsbc.org](http://www.nvsbc.org) and is a result of our communications campaign which will continue through the fall to voice our concerns to policymakers. We have also reached out to other veteran organizations to garner support. I can tell you, since the article was published, ***I’m hearing more from the people who want to abolish VETS First than I am from those of us in support of VETS First.***

As I have preached in this column before, I am concerned about the future of VETS First. If it goes away, those of you who did not speak up will regret it. If we **do** all speak up, we can protect ourselves as veteran-owned businesses competing in federal space.

Due to the efforts of our NVSBC “Medical Products Industry Group” the Government Accountability Office (“GAO”) questioned, and the VA has pulled back, all solicitations for adding products to the Medical/Surgical Prime Vendor catalogue. The VA is going back to the drawing board on how to procure medical/surgical supplies. This is a prime example of the influence we as veteran small businesses can have if we band together. We need to be as pro-active in other industries as we have been in medical products. We can make a difference!!

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

### JOIN US AT THE NVSBE!

For those of you going to the VA’s annual small business conference in St. Louis in early December, the NVSBC will be there in full force with staff and Board members. If you are going, and interested in having a meeting of NVSBC members to have updates and plan a path forward, please let Scott Denniston know at [scott.denniston@nvsbc.org](mailto:scott.denniston@nvsbc.org).

The National Veterans Small Business Engagement’s (NVSBE) website can be accessed here.

## VETERAN COURT VICTORY OVER ABILITYONE ON HOLD

On September 1, 2017, the U.S. Court of Federal Claims (“CoFC”) granted an AbilityOne vendor’s request to stay the relief granted in a landmark case confirming that veteran-owned businesses take priority over AbilityOne vendors at the U.S. Department of Veterans Affairs (“VA”). As such, the VA may not procure eyewear products or services in VISNs 2 or 7 outside of the AbilityOne Procurement List until the appeal is resolved. (*PDS Consultants, Inc. v. U.S.*, No. 16-1063C).

As many veteran-owned businesses competing in federal space are aware, a recent CoFC decision issued on June 30, 2017 held that at the VA, veteran-owned small businesses (“VOSBs”) and service-disabled veteran-owned small businesses (“SDVOSBs”) trump AbilityOne vendors (employers of those who are blind or have other significant disabilities). Even if a product or service is on the AbilityOne Procurement list, the “Rule of Two” (i.e., that the VA must set aside the procurement for VOSBs or

SDVOSBs when a contracting officer had a reasonable expectation that he will receive offers from two or more qualified VOSBs at fair market prices) still applies.

In the case at issue, the VA had decided to procure eyewear products and services from an AbilityOne nonprofit for four Veterans Integrated Service Networks (“VISNs”) without performing a Rule of Two analysis. In its protest, PDS, an SDVOSB, argued based on the plain language of the Veteran Benefits Act (“VBA”) and the broad reading to the language of the VBA given by the Supreme Court in *Kingdomware*, that the VA’s decision to continue to enter into new purchasing agreements for eyewear products and services with AbilityOne nonprofits for VISNs 2, 6, 7 and 8 before performing a Rule of Two analysis was inconsistent with the VA’s obligations under the VBA.

The court entered judgment in favor of PDS and denied the government’s and the AbilityOne contractor’s (Wilson-Salem Industries for the Blind, Inc., DBA “IFB”) motion for judgment upon the administrative record on June 30, 2017.

With a reported 52 jobs and \$15.4 million in avenue revenue on the line, IFB [filed an appeal](#) on July 31, 2017. It then asked the CoFC to stay its decision, meaning the VA may not procure eyewear products or services in VISN 2 or 7 outside of the AbilityOne Procurement List until the appeal is resolved. As this motion was granted, this means that so long as the appeal is pending, IFB’s jobs and revenue from the contracts at issue are protected. Also, the VA may extend its contract as permissible under option years.

## NVSBC D.C. Chapter Update

On September 13, the NVSBC D.C. Metro Chapter kicked off this season with a dinner meeting featuring an enlightening presentation by Pete Tseronis, the Founder/CEO of consulting firm Dots and Bridges, LLC. An accomplished entrepreneur, business executive, and cybersecurity strategist with 25+ years of experience leading cabinet-level and commercial entities, Pete is an ambassador for technological innovation and possesses the highest degree of effective communications and candor while applying progressive technologies to enterprise strategy. Pete provided insights on:

- Applying unique prospecting, cultivating and positioning methodologies to secure more customers; and
- Aligning go-to-market strategies (and surgical messaging) with federal funding initiatives; and
- Leveraging market intelligence & analysis to support the adoption of next-generation digital infrastructure.

Stephanie Alexander & 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. To join our new Match Making platform – go to [govmates.com](http://govmates.com) to learn more. Also, remember that Boot Camps are offered each month at 4-5:30PM prior to the monthly dinner meetings.

The D.C. NVSBC Chapter meets monthly on the 2nd Wednesday of each month from September through June at the Key Bridge Marriot in Arlington, VA. For event notices’ check [NVSBC.org](http://NVSBC.org).



## BID PROTEST LESSON: CANCELLATIONS ARE *USUALLY* A LOSE/LOSE

Especially for small businesses, the time and expense spent in pursuing solicitation is an investment. Sometimes we win, sometimes we lose, but what can we do in the event no one wins or loses? What happens when an agency decides to take an opportunity off the table, even after offers are received? Can we protest and make an agency issue an award?

When it comes down to it, the answer is usually no, and hence the purpose of this article - we want you to know when it might not be worth protesting, because if it isn't, you're out not only the award, but also the time and expense of a protest. (And as small businesses who seek to establish good relationships with an agency, we must choose wisely in deciding whether to protest).

Here is the rule on cancellation in a nutshell: ***an agency can cancel a solicitation, at any time, so***

***long as it has a reasonable basis to do so.*** One oft-cited permissible basis is when an agency determines that a solicitation does not accurately reflect its needs. *MedVet Dev., LLC*, B-406530 (2012). This is allowable no matter when the information giving rise to the cancellation is presented, even if it is after offers have been submitted and evaluated. *A-Tek, Inc.*, B-286967 (2001). This means that if you submit an offer for a solicitation and the agency then decides it doesn't need the work after all, you're out of luck. Chalk it up to a cost of doing business with the federal government.

There are, however, exceptions, and it is important to know whether your situation truly fits in one of these categories prior to lodging a protest. The *first* is when the agency's rationale for cancelling a solicitation is a pretext - i.e., the agency's actual motivation is to avoid awarding a contract on a competitive basis or to avoid resolving a protest. For example, the Government Accountability Office ("GAO") once sustained a protest where an agency cancelled a solicitation

and then issued a sole-source contract to avoid addressing improper procurement issues. (Interestingly, this involved potentially giving an unfair advantage to the same contractor the agency awarded the sole-source contract). The GAO found cancellation improper. *Superlative Technologies, Inc.*, B-310489 (2008).

The other exception is when the agency simply cannot tell you why they cancelled the procurement. Generally, any reasonable basis will do, but if the agency offers no rationale and cannot back up its decision with some form of supporting documentation, the GAO will sustain a protest. See *Walker Dev. & Trading Group, Inc.*, 413924 (2017).

Be careful. If you're going to protest a cancellation, know if your case is the exception, or the rule.

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## COURT STRIKES DOWN FLSA OVERTIME EXCEPTION



In a decision issued on August 31, 2017, a federal district judge struck down the Department of Labor's ("DOL") new overtime exemption rule which would have significantly increased the salary threshold under the Fair Labor Standards Act (FLSA). The court held that the DOL exceeded its authority in promulgating the new rule: it set the salary threshold so high that it essentially eliminated the requirement that exempt employees must perform executive, administrative or professional duties.

As a quick recap, the FLSA requires that employers pay non-exempt employees overtime for any hours worked beyond 40 in a week. An employee must satisfy three conditions in order to be considered exempt from overtime requirements:

1. Be paid a fixed salary;
2. The employee's salary meets a minimum threshold; and
3. The employee's position meets certain duties requirements applicable to executive, administrative, or professional positions.

While the district judge didn't answer the question of how high a threshold is too high, leaving this up for future debate, as federal contractors we should keep in mind that DOL is changing the test because misclassification violations are on its radar. We should continue to evaluate all exempt salaried positions to ensure positions meet the relevant salary basis and duties tests.

## SENATE SOON TO VOTE ON 2018 NDAA

The Senate will soon vote on the 2018 National Defense Authorization Act ("NDAA"), which contains many amendments that will affect both federal contractors and veterans if passed. While not all (or most) of these will make the final cut, here are some we should keep an eye on:

\*Tammy Duckworth (D- IL) proposed an amendment that will give service members 84 days of paternal leave regardless of sex or marital status.

\* Patty Murphy (D-Wash) wants to hold contractors accountable for discriminating against their employees, proposing two amendments to this end:

The *first* prohibits the Department of Defense ("DoD") from entering into a contract with a business or person that discriminated against an individual on the basis of sex through payment. Businesses that have violated a discrimination law within the past three years will be barred from obtaining a DoD contract worth more than \$500,000.

The second prohibits the DoD from entering into contracts with businesses that owe employees or former employees a cumulative \$100,000 in unpaid wages and associated damages resulting from violations of law.

As you might notice, these rules are very narrow. They also raise several questions, such as how one is found to have violated a discrimination law. Do settlements count?

The House of Representatives has already passed its own version of the NDAA, which was approved 344 to 81. Exceeding President Trump's \$603 billion defense budget request and breaking longstanding caps on national defense spending by about \$72 billion, lawmakers would need to strike a deal to increase or repeal the budget caps.

While the Senate Armed Services committee has already approved its version of the NDAA, the full Senate's vote should take place this week. Stay tuned for further developments.

### Miss Our Tampa Meeting?

We had to cancel our Tampa meeting on September 7th due to the evacuation for Hurricane Irma. Our program is re-scheduled for **October 3rd**, and the speaker will be Heidi Gerding "Joint Ventures that Win: How It's Done". Anyone who had already paid for September is paid for the October meeting. If you have any questions, please reach out to Brian Book at [brian.book@bookzurman.com](mailto:brian.book@bookzurman.com).



## 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](mailto:scott.denniston@nvsbc.org).