



# FIRST CALL

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## Update from NVSBC

*A message from NVSBC Executive Director, Scott Denniston*



As I write this, our baseball fans in the D.C. area can't wait to have the World Series back in D.C. for the first time since 1933. GO NATS! Just waiting to see whether it will be Houston or the Yankees!

Heather informed me this week that **the NVSBC has reached 500 members.** This is a huge milestone for the NVSBC as we approach our 10-year anniversary in June 2020. A very sincere THANK YOU to our long-time members and our newer members. Please invite all SDVOSBs and VOSBs you know to join our movement.

Last month I discussed the Ability One issue as it relates to VETS First at VA. We have learned that Ability One and their lobbyist have been successful in getting a bill drafted that will put Ability One ahead of VETS First at VA. As discussed before, this is only the first of many attempts to weaken VETS First at VA. Once we have a bill number assigned, we will be asking each of you to contact your

Congressional representatives and tell them to oppose the Ability One bill. Congress responds to numbers so it is up to each of you to step up!

In this edition, Sarah (Schauerte) Reida has an article on the U.S. Court of Federal Claims decision in the *Veterans4You* case which is not favorable for SDVOSBs. Please read and get knowledgeable! Another Court of Federal Claims decision which was not favorable to SDVOSBs is *Land Shark Shredding, LLC vs. United States*. No 18-1568C. VA is using the *Land Shark* decision to justify its position that in a tiered evaluation procurement, it is justified in opening all offers at the same time to determine price reasonableness. This is not how tiered evaluation is supposed to work, as it offers no advantage to any small business, let alone SDVOSBs under VETS First.

Attacks against Vets First continue! Will you help us fight back?

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

#### Min Wage for Gov't Workers Increases in 2020

The Wage and Hour Division ("WHD") of the U.S. Department of Labor ("DOL") announced a minimum wage increase of \$0.20 to \$10.80 per hour to be paid to workers performing work on direct federal contracts and subcontracts covered by Executive Order 13658. This goes into effect on January 1, 2020, so know that if you have employees subject to the Service Contract Act, Davis-Bacon Act, or the Fair Labor Standards Act (non-exempt), you must adhere to the new rates (and are eligible for a price adjustment on your federal contract).

### How'd You Like to Wave Goodbye to LPTA?

You may be aware that the 2019 NDAA mandated limitations on the use of lowest-price, technically-acceptable (“LPTA”) method of evaluating offers for federal solicitations. Now, a proposed FAR Rule aims to put that mandate in action.

In general, contractors tend to dislike the LPTA method of evaluation versus “best value.” It’s frustrating to know that when submitting a carefully-drafted proposal, it won’t even be opened if you’re not the lowest-priced offeror. Even if your past performance kills it, you can lose out to a newly-formed entity that underbids and then squeaks by on technical (especially if a lack of past performance gives one a “neutral” rating rather than disqualifies them).

The proposed rule implements the 2019 NDAA’s policy to avoid LPTA “in circumstances that would deny

the Government the benefits of cost and technical tradeoffs in the source selection process.” It applies only to civilian agencies (not those under the DoD, which has its own rule; and not the GSA, which will implement its own rule for Federal Supply Schedules).

Among other provisions, the Rule states that LPTA “shall only be used” in certain circumstances (such as when there’s no benefit to an offeror having superior technical/past performance). It also states that contracting officers should avoid using LPTA for certain types of acquisitions “to the maximum extent practicable,” including information technology services.

Again, this is a *proposed* rule. If you have input for purposes of the final rule, give it! Access the rule and instructions here.

### New Cheat Sheet for SDVOSB Joint Ventures

After two years of having an incorrect Verification Assistance Brief available to SDVOSB joint ventures seeking VetBiz verification, the VA’s Center for Verification and Evaluation has finally corrected it! This update removes the incorrect information and contains additional guidance of value.

This updated brief now correctly states that profits of the joint venture must be commensurate with performance (versus ownership interest), as well as properly refers to the SBA’s joint venture provisions (which now apply versus the VA’s), as applicable as of 2016.

For those of you considering forming a joint venture to compete for SDVOSB set-asides, it’s nice to have another resource! Access it here.

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## Protesting: The Clock Might Be Ticking Behind Your Back

When it comes to protesting procurement decisions, it’s all about timing. For instance, if you want to protest *how* an agency is conducting a procurement (the decision to/to not set aside, the inclusion of unduly restrictive solicitation requirements, ambiguous requirements, etc.), you must do it before offers are due or lose your chance. If you want to protest losing an award, you have ten days from notification to protest, unless a debriefing is required *and* timely requested. These deadlines are strict, and almost no exceptions apply.

One recent case illustrates this perfectly. In *Information Unlimited, Inc.*, B-41516 (Oct. 2019), an offeror for an Air Force RFP was eliminated from competition because it was found technically unacceptable. The company immediately requested a debriefing, and the Air Force provided it that same day. Unaware that it had received its debriefing, the protestor waited over six months before asking the Air Force when it would be provided. The Air Force then again provided the debriefing, and the firm protested within 10 days.

Unfortunately for the protestor, the Air Force was successful in seeking summary dismissal for untimeliness. The protestor had an obligation to “diligently purs[ue] a debriefing,” and waiting half a year to check in on the debriefing did not meet this obligation. **This presents a good practice tip: if you’ve requested a debriefing, make sure you haven’t gotten it and missed it, because a clock might be running without you knowing it.**



## How Combining With Another Makes You Smaller

With the SBA's (relatively) new All Small Mentor-Protégé Program, some of our members have been exploring its benefits. The Small Business Administration's Office of Hearings and Appeals ("SBA OHA") just issued a decision that illustrates one big benefit to participation: a small business will *not* be deemed "affiliated" with its mentor (and therefore the two firms combined for size purposes) even if over 70% of its revenue is derived from its mentor.

This is an issue that has arisen before. If a company is new, it has to start somewhere, right? If a company is small and starts out with a contract with a large firm, if it pursues an effort on its own, it might be deemed "large" due to its revenue from (and therefore affiliation with) the other firm. However, this SBA OHA case

holds that this issue does not exist if the two entities are in an approved mentor-protégé relationship. *Avar Consulting, Inc.*, SBA No. SIZ-6017).

The SBA's affiliation rules (13 C.F.R. § 121.103) provide that there is a presumption of "identity of interest" based upon economic dependence if a firm derives 70% or more of its receipts from another business over the previous three fiscal years. In this case, however, the SBA OHA held that this is a non-issue in the event these two entities are in an approved mentor-protégé relationship. **As such, this presents an obvious takeaway: if, as a small business, you know that you might "break" the 70% rule with a large business that could act as your mentor (and it matters; i.e., you plan on pursuing a small business set-aside as the prime), consider pursuing an SBA-approved mentor-protégé relationship.**

### Upcoming NVSBC Events

- Oct 28-30 - VIB in San Diego, CA
- Nov 6-9 - Business Beyond the Battlefield in Arlington, TX
- Nov 7 - South Florida Chapter Dinner
- Nov 12 - DC Metro Chapter Dinner **\*\*note this is a Tuesday\*\***
- Nov 19 - Mid-Atlantic Chapter Luncheon
- Nov 20-22 - SAME Small Business Conference
- Dec 3 - New England Venture Summit
- May 26-29, 2020 – VETS 20! (San Antonio, TX)

Want more details? Check the email we sent you on October 4, or reach out to Heather Lee at [heather.lee@nvsbc.org](mailto:heather.lee@nvsbc.org).

## D.C. Chapter Update

The D.C. Metro Chapter of NVSBC held its first October dinner meeting on the 9th. Our guest speaker for our dinner meeting was Martha Miller, the Director of the Securities and Exchange Commission's Advocate for Small Business Capital Formation. Martha explained how this organization can assist SDVOSBs, and also provided excellent insight into its operations. She also delivered an inspiring speech that referenced both General George S. Patton and Admiral William McRaven, and reminded everyone of Admiral McRaven's famous recommendation, "If you want to change the world, start off by making your bed." (Sound familiar? Read his original speech here).

Mr. Tom Leney, Associate Executive Director, Strategic Acquisition Center (SAC), also provided an update on new and enhanced acquisition programs being announced by the SAC. More details on these programs will be made available shortly.

The D.C. Chapter meets monthly (2nd Wednesday) from September through June at the Key Bridge Marriot in Arlington, VA. It offers boot camp training prior to each meeting (4:00 PM to 5:30 PM), as well as match-making opportunities via its platform of [govmates.com](http://govmates.com). To date, there have been 24,673 matches, which have resulted in 3,694 introductions resulting in net new business for [govmates.com](http://govmates.com) members. For event notices, check [NVSBC.org](http://NVSBC.org).





## VA Finds Kingdomware Loophole Via GPO

A few months ago, we covered the GAO case of *Veterans4You, Inc.*, where the GAO held that even if using another agency to acquire goods or services, the VA is still bound to adhere to the Rule of Two (B-417340). The GAO concluded that under Section 8128 of the Veterans Benefits Act, the VA's set-aside requirements are mandatory even when other statutes (like the printing mandate, which was applicable there, as the VA was acquiring suicide gunlocks with labeling and a wallet card via the Government Publishing Office) apply. It stated: "[A]ny time the VA is acquiring goods or services – without limitation – it is required to determine whether there are at least two SDVOSBs or VOSBs capable of meeting the agency's requirements at a fair and reasonable price." As such, the VA was required to adhere to the Rule of Two when acquiring gunlocks through the GPO. Less than two weeks later, however, the VA turned around and issued via the GPO *the exact same requirement*.

GAO rulings are recommendations. However, agencies usually follow the GAO's recommendations (often at a 100% adherence rate per the GAO's yearly report). Interestingly, the years in which the most GAO recommendations were *not* followed were those where the VA's obligations under the Veterans Benefits Act and the Rule of Two were challenged. Again, the VA appeared to not be following the GAO's recommendation. Seeking a forum with "teeth" to rule that the VA was always bound to follow the Rule of Two (even when acquiring services or goods through other agencies), Veterans4You filed suit in the U.S. Court of Federal Claims (CoFC)(No. 19-931C).

In a surprising twist, in a decision that featured less than seven pages of analysis, the CoFC denied Veterans4You's motion for

injunctive relief, finding that the VA was properly conducting the procurement via the GPO and also that it did not violate the Rule of Two. *First*, the CoFC found that the GPO was properly conducting the acquisition. Even though it sounds crazy to allow an agency to order gunlocks through the GPO (which is subject only to the Printing Procurement Regulation), the CoFC found that it was proper for the GPO to acquire the *labeling and wallet cards*. Then, because the *gunlocks* were to be acquired at the same time, it was reasonable for the VA to acquire the items together through the GPO. There was no law prohibiting the VA from doing so.

*Second*, the CoFC found that the VA had not violated the VBA. Here, one important distinction from the predecessor GAO case is that when the VA acquired the gunlocks, this time it complied with 38 U.S.C. 8127(i) by informing the GPO of the VBA's requirements and asking it to comply to the "maximum extent feasible." It did this by including additional language on SF-1, which is used when an agency places a requisition with the GPO. Even though the GPO does not have a mechanism to permit a set-aside, the CoFC concluded this was enough for compliance with the VBA. This was despite Veterans4You arguing that compliance with the Rule of Two was the "heart" of the VBA and that such a ruling would effectively render the purpose of the VBA meaningless in the instance another agency could not comply. The CoFC found that the "plain language" of the statute (and Congressional history changing the language of 8127(i) to "the maximum extent feasible"), applied the Rule of Two only to the VA. In effect, once a procurement was out of its hands, so is the Rule of Two.

Drafting error? Did the CoFC get this wrong? What do you think?

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